

***United States Court of Appeals  
for the Second Circuit***



**APPELLANT'S  
BRIEF &  
APPENDIX**





ORIGINAL

To be argued by  
ROBERT S. PERSKY

74-2490

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

C.A. Docket No. 74-2490

UNITED STATES OF AMERICA,

Appellee,

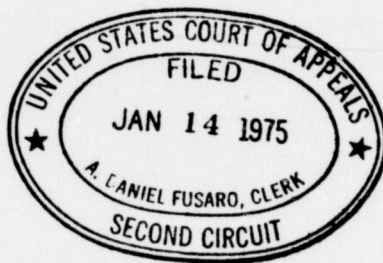
-v-

STANLEY SPIRN,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE  
SOUTHERN DISTRICT OF NEW YORK

BRIEF AND APPENDIX ON BEHALF OF APPELLANT



ROBERT S. PERSKY,  
Attorney for Appellant  
40 Journal Square  
Jersey City, N. J. 07306

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QUESTIONS PRESENTED

1. Did the court err in not directing the government to affirm or deny the existence of a governmental electronic surveillance of the defendant or his alleged co-conspirator and of the attorney for the defendant as set forth in defendant's motion for disclosure of the electronic surveillance?

2. Did the government fail to establish that the alleged Russian National was "duly notified" to the United States as an officer or employee of a foreign government and was present in the United States on official business?

3. Was the defendant's mere presence at the scene of the alleged offense sufficient to find guilty participation even if defendant has knowledge that a crime is being perpetrated by another? Was the court's failure to grant the defendant's request for the Garguilo charge in such circumstances reversible error?

4. Was it error for the court to allow the government to refer to the former adjudication of the defendant as a juvenile delinquent?

5. Was it error for the court to allow government counsel to read to the jury the transcript of findings and special findings made in a Juvenile Court in a proceeding against the defendant and another to prove the defendant's intent or motive with respect to the charge in the indictment?

6. Did the Court err in its answer to the jury concerning their note reading: "Why did no character witnesses come forward?"

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5 Is it customary?"  
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8           7. Is counsel for the defendant entitled to compensa-  
9 tion for services rendered at the arraignment, motions, trial and  
10 sentencing, under the provisions of the Criminal Justice Act?  
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## STATUTES

## § 2. Principals

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal. As amended Oct. 31, 1951, c. 655, § 17b, 65 Stat. 717.

## § 970. Protection of property occupied by foreign governments

(a) Whoever willfully injures, damages, or destroys, or attempts to injure, damage, or destroy, any property, real or personal, located within the United States and belonging to or utilized or occupied by any foreign government or international organization, by a foreign official or official guest, shall be fined not more than \$10,000, or imprisoned not more than five years, or both.

(b) For the purpose of this section "foreign official", "foreign government", "international organization", and "official guest" shall have the same meanings as those provided in sections 1116(b) and (c) of this title.

Added Pub.L. 92-539, Title IV, § 401, Oct. 24, 1972, 86 Stat. 1073.

## § 1116. Murder or manslaughter of foreign officials or official guests

(a) Whoever kills a foreign official or official guest shall be punished as provided under sections 1111 and 1112 of this title, except that any such person who is found guilty of murder in the first degree shall be sentenced to imprisonment for life.

(b) For the purpose of this section "foreign official" means—

(1) a Chief of State or the political equivalent, President, Vice President, Prime Minister, Ambassador, Foreign Minister, or other officer of cabinet rank or above of a foreign government or the chief executive officer of an international organization, or any person who has previously served in such capacity, and any member of his family, while in the United States; and

(2) any person of a foreign nationality who is duly notified to the United States as an officer or employee of a foreign government or international organization, and who is in the United States on official business, and any member of his family whose presence in the United States is in connection with the presence of such officer or employee.

(c) For the purpose of this section:

(1) "Foreign government" means the government of a foreign country, irrespective of recognition by the United States.

(2) "International organization" means a public international organization designated as such pursuant to section 1 of the International Organizations Immunities Act (22 U.S.C. 288).

(3) "Family" includes (a) a spouse, parent, brother or sister, child, or person to whom the foreign official stands in loco parentis, or (b) any other person living in his household and related to the foreign official by blood or marriage.

(4) "Official guest" means a citizen or national of a foreign country present in the United States as an official guest of the government of the United States pursuant to designation as such by the Secretary of State.

Added Pub.L. 92-539, Title I, § 101, Oct. 24, 1972, 86 Stat. 1071.

STATEMENT OF FACTS - PROCEDURAL HISTORY

On May 24, 1974 William Schroeder, a Special Agent of the Federal Bureau of Investigation, swore out a complaint against Stanley Spirn alleging violation of Title 18 U.S.C. sections 970 and 2.

The complaint charged that on or about the 24th day of May 1974 the defendant, Stanley Spirn, unlawfully, unwillfully and knowingly, attempted to damage and destroy property located within the United States and belonging to, utilized and occupied by a foreign official and guest. (2a) A similar complaint was filed against co-defendant, Victor Vancier.

The Grand Jury indicated the defendant Stanley Spirn and co-defendant Victor Vancier for violation of the aforementioned statute. (4a) Both pleaded not guilty.

On August 16, 1974 at a pretrial hearing before Hon. Inzer B. Wyatt, Mr. Vancier's counsel notified the court of Mr. Vancier's election to be tried as a juvenile. The Court ordered separate trials. (T. Aug. 16, 1974, 11-24 to T12-14).

On September 12, 1974 the Court denied counsel, Robert S. Persky's application to be appointed under the Criminal Justice Act (T. Sept. 12, 1974, 4-25 to T5-25).

Counsel made a request that Mr. Spirn be given a daily transcript free of charge as he was an indigent (T. Sept. 12, 1974, 23-20 to 23). The Court stated that it would not be inclined to do so, although it would reserve its decision until time of trial (T23-24 to T24-15).



Counsel for the defendant then raised the issue of the constitutionality of the statute of which the defendant was tried. The Court ordered that such motion be heard and determined after trial (T. Sept. 12, 1974, 24-16 to T26-14).

On September 16, 1974 further Pre-Trial hearings were conducted. The Court heard argument of counsel pertaining to certain Pre-Trial Motions.

In regard to the Motion to suppress the government produced the testimony of one of the police officers (T. Sept. 16, 1974, 11-1 to T19-9).

The defendant Stanley Spirn elected to take the witness stand in regard to the motion to suppress (T. Sept. 16, 1974, 24-17 to T28-16). The Court denied defendant's motion to suppress (T. Sept. 16, 1974, 20-18 to T24-2).

On September 19, 1974 a further suppression hearing was held. The Court heard testimony from two New York City patrolmen and after hearing such testimony denied defendant's motion to suppress certain statements allegedly made by him (T. Sept. 19, 1974, 4-18 to T17-17).

The government alerted the Court of its intention to offer into evidence the findings of a judge's decision in a prior juvenile trial of which the defendant Spirn was found to be a juvenile delinquent. The Court reserved decision (T. Sept. 19, 1974, 18-17 to T19-23).

After the above proceedings took place the jury was then

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2  
3 impaneled and the trial commenced.  
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5           The first witness produced by the government was Brian  
6  
7 Abernathy, a police officer of the New York City Police Department  
8  
9 (T. Sept. 19, 1974, 10-7 to 10). The officer on direct examination  
10 testified that he was on patrol in an unmarked police car approxi-  
11 mately 4:30 in the morning. While driving on Lexington Avenue near  
12  
13 68th Street he observed two individuals in a car parked at the curb  
14  
15 (T. Sept. 19, 1974, 11-4 to 10). The officer then proceeded around  
16  
17 the block and upon viewing the automobile again, he only noticed  
18  
19 one individual in the vehicle and another individual on the side-  
20  
21 walk (T12-19 to 23). The individual outside the automobile was  
22  
23 Vancier, the individual inside the automobile was the defendant  
24  
25 Spirn (T12-24 to T13-10). The officer testified that he saw Vancier  
26  
27 pouring the liquid on to the automobile in front of Mr. Spirn's  
28  
29 car which automobile was, as he later found out, the property of an  
30  
31 alleged foreign official of the Russian Government. The officer  
32  
33 admitted on cross-examination that he did not observe Vancier taking  
34  
35 a can, which was later determined to contain a liquid similar to  
36  
37 gasoline, out of Mr. Spirn's vehicle (T. Sept. 19, 1974, 30-21 to  
38  
39 T31-2).  
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43           The next witness produced by the government was a New York  
44  
45 City Police Officer named John Sullivan (T. Sept. 12, 1974, 39-10  
46  
47 and 11).  
48

49           The Court then entertained and granted a motion of the  
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51 Assistant New York Attorney to introduce the findings of a judge in  
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4 a Juvenile Delinquency proceeding in which the defendant was adjudi-  
5 cated a juvenile delinquent. Counsel for the defense vigorously  
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7 interposed his objection which was overruled (T. Sept. 19, 1974,  
8  
9 48-13 to T53-22).

10  
11 The next witness called by the government was Patrolman  
12  
13 John W. Sullivan. Patrolman Sullivan was on the same beat as  
14  
15 Patrolman Abernathy and his testimony was substantially in accord  
16  
17 with the former policeman's testimony (T. Sept. 19, 1974, 39-10 to  
18  
19 T83-5).

20  
21 The next witness called by the government was one Thomas  
22  
23 Jackson who was a chemist for the New York City Police Department  
24  
25 in their crime laboratory (T83-13 to 20). Mr. Jackson testified  
26  
27 that his examination of the contents of the can which allegedly  
28  
29 was confiscated from Mr. Vancier was that of a liquid which exhibited  
30  
31 properties similar to that of gasoline (T. Sept. 19, 1974, 84-22  
32  
33 to 25).

34  
35 The officer admitted that he did not know what was in the  
36  
37 container prior to May 30, 1974 which was the date of his examina-  
38  
39 tion (T. Sept. 19, 1974, 86-17 to 19).

40  
41 The government then produced Mr. Sol Kuttner who was an  
42  
43 adviser of international organization affairs with the United States  
44  
45 Mission to the United Nations (T. Sept. 19, 1974, 89-11 to 14).

46  
47 Mr. Kuttner produced a document which indicated that  
48  
49 Valdimir Yezhov had been issued DPL license plates (T. Sept. 19, 1974  
50  
51 92-15 to 17; also T. Sept. 19, 1974, 93-23 to T94-2).  
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The witness also produced a letter from the State Department of the United States in Washington stating that it had no objections to the inclusion of the name of Valdimir Yezhov on the diplomatic list.

From the aforementioned information Mr. Kuttner concluded over defense counsel's objection, that Validmir Yezhov was an attache of the U.S.S.R. (T. Sept. 19, 1974, 95-18 to 96-2).

The next witness produced by the government was William Schroeder who was a special agent of the Federal Bureau of Investigation (T. Sept. 19, 1974, 102-4 to 7). Mr. Schroeder testified that the defendant stated in the offices of the Assistant U. S. Attorney Mr. Raykoff that he owned a Pontiac automobile (T. Sept. 19, 1974, 104-13 to 16).

Mr. Wile over the objection of defendant's counsel then read to the jury the findings of Judge Tyler, first as to the adjudication of delinquency against Mitchell Rein and then as to the findings of delinquency of the defendant (T. Sept. 19, 1974, 131-11 to T139-16). The purpose of the reading of the findings in the aforementioned matter was stated by the Court as indicating a motive for which the defendant now stands trial (T. Sept. 19, 1974, 130-22 to T131-9). (21a)

The government then rested its case (T. Sept. 19, 1974, 140-3).

Defendant's counsel then made a motion for a judgment of acquittal which the court denied (T. Sept. 19, 1974, 140-8 to T141-10).



The following day the Court reviewed the Request to Charge of the government and of the defendant.

The defendant then rested (T. Sept. 20, 1974, 152-16 to 18). The defendant's attorney then summed up (T. Sept. 20, 1974, 155-9 to T196-11).

The government then summed up its position to the jury (T. Sept. 20, 1974, 196-14 to T208-3).

The Court then charged the jury (T. Sept. 20, 1974, 211-4 to T229-12). (5a)

During the deliberations of the jury they came back with four questions:

(1) "Why was the defendant not put on the stand and allowed to refute the testimony" (T. Sept. 20, 1974, 230-4 to 5).

(2) "What are our instructions if we cannot come to a unanimous verdict?" (T8-4).

(3) "Why did no character witnesses come forward? Is it customary?" (T. Sept. 23, 1974, 242-11 to 12).

(4) "When a juror bases his vote on evidence not presented, that is on supposition only, how do we overcome this?" (T. Sept. 23, 1974, 246-8 to 10).

The jurors then returned and found the defendant guilty (T. Sept. 23, 1974, 250-25).

The defendant was sentenced on November 7, 1974. Prior to sentencing, the Court denied defendant's motion attacking the Constitutionality of the statutes in question.

## ARGUMENT

POINT I

THE COURT ERRED IN NOT DIRECTING THE GOVERNMENT TO AFFIRM OR DENY THE EXISTENCE OF A GOVERNMENTAL ELECTRONIC SURVEILLANCE OF THE DEFENDANT OR HIS ALLEGED CO-CONSPIRATOR AND OF THE ATTORNEYS FOR THE DEFENDANT AS SET FORTH IN DEFENDANT'S MOTION FOR DISCLOSURE OF THE ELECTRONIC SURVEILLANCE.

At a pretrial conference on September 12, 1974 the Court in determining the defendant's motion for disclosure of electronic surveillance asked the Assistant United States Attorney whether or not there would be "any evidence introduced which is the result of wire taps" (Tr.Sept.12,1974,17-5to6). The U. S. Attorney answered "No" (Tr.Sept.12,1974,17-7). The Court then stated (T17-8) "Mr. Persky, that ends that". The defendant's counsel then argued, (T17-9to25):

"MR. PERSKY: It is our position that whether or not the Government utilizes any information which was gleaned through electronic surveillance is not the criteria which would determine whether or not any information in fact was obtained through electronic surveillance.

However, again, in the interests of justice, we would agree to a search by the Government of those agencies and those individuals named, whether or not they were in fact wiretapped, and if the Government cannot complete that before the commencement of the trial, it would be agreeable to us if they would represent to us after the trial, after the search was completed, that there had been no such wiretaps.



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6 However, if there were wire taps involved in this  
7 case, we believe that they may, in fact, be material and sub-  
8 ject matter which should be at least the subject of a hearing  
9 to determine their legality".  
10

11  
12 Counsel for the defendant raised the issue again on  
13 Page 26, Line 15 to 22, concerning the possibility of elec-  
14 tronic surveillance. The Court again refused to entertain  
15 defendant's motion (Page 26, 23 to 26A, Line 3).  
16  
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18  
19 The defendant's position on this Motion is supported  
20 by In Re Horn, 458 F.2d 468 (1972) (Dist. of Pa. 3rd Cir.), which  
21 held that:  
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25 "When a witness files a petition to suppress  
26 pursuant to 18 U.S.C. Section 2518 (10) (a), the  
27 Government is obliged to affirm or deny the oc-  
28 currence of the lawful act." 18 U.S.C. Section 3504  
29 (a) (1). It may do so by affidavit. In the mat-  
30 ter of Grumbles, 453 F.2d 119 (3rd Cir. 1971).  
31 If the Affidavit is sufficient on its face and  
32 the Petitioner offers nothing to indicate that  
33 the Affidavit is false or defective, the trial  
34 court has the power to deny the petition."  
35

36 In the case at bar the Government did not offer an  
37 Affidavit in which it either affirmed or denied the occurrence  
38 of the act in question. Rather, it merely responded to the  
39 Court's inquiry of whether there would be evidence introduced  
40 which is the result of wire tap, by stating: "No" (Tr. Sept 12,  
41 1974, 17-4 to 7). This response by the Government is insufficient  
42 under In Re Horn, supra, to be dispositive of the Motion. The  
43 mere fact that the government contends that it will not rely  
44 upon any information gleaned through electronic surveillance  
45 is not sufficient to bar the admission by them of whether or  
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not there had been electronic surveillance. If the Government is unwilling to permit the disclosure to the extent required for a full-dress adversary hearing, then the consequences of that choice should be visited on the Government. United States vs. Cotton Valley Operators Committee (WD LA) 9 FRD 719, affirmed by an equally divided court, 339 U.S. 940, 94 L Ed. 1356, 70 S Ct. 793 (1950).

Basic Federal policy favors pretrial hearings on Motions to Suppress. Battle v U.S. (DC Cir.) 345 F2 438; 54 Cal.L.Rev.1070 (1965).

It is further submitted that if national security is to justify denial or deferral of disclosure, then the denial or the deferral must be attended with procedural safeguards. United States vs. Reynolds, 345 U.S.1, 97 L Ed. 727, 73 S Ct. 528 (1953).

It is fundamental that every defendant in a criminal trial should be entitled to challenge the admission of any evidence obtained in violation of the Fourth, Fifth, or Sixth Amendments.

It is therefore submitted that the Court's denial of defendant's motion constituted error and the matter should be remanded and a finding made by the District Court in accordance with Alderman v. the United States, 394 U.S. 165 (1969) at Page 186, to determine whether with respect to the defendant there had been an electronic surveillance which violated his Constitutional rights; and if there was such surveillance, the nature and relevance of such surveillance to his conviction should be determined.



POINT II

THE GOVERNMENT FAILED TO ESTABLISH THAT THE ALLEGED RUSSIAN NATIONAL WAS "DULY NOTIFIED" TO THE UNITED STATES AS AN OFFICER OR EMPLOYEE OF A FOREIGN GOVERNMENT AND WAS PRESENT IN THE UNITED STATES ON OFFICIAL BUSINESS AS REQUIRED BY 18 U.S.C. 970.

The statute under which the defendant was found guilty 18 U.S.C. 970 refers to 18 USC1116 subsection (b) (2) in defining "foreign official". Said subsection defines a "foreign official" as:

"any person of a foreign nationality who is duly notified to the United States as an officer or employee of a foreign government or international organization, and who is in the United States on official business, and any member of his family whose presence in the United States is in connection with the presence of such officer or employee."

The Government is attempting to establish that the alleged foreign national was "duly notified" to the United States as an officer or employee of a foreign government, presented as a witness Mr. Sol Kuttner, an adviser on International Organization Affairs with the U.S. Mission to the U.N. (T89-2 to 14). Through Mr. Kutter the Government introduced into evidence an index card Government exhibit 3 which was a purported record of the issuance of a set of diplomatic license plates to an individual diplomat (T90-16 to 20). Said index card had written on it inter alia the license number of the automobile of which the defendant was found guilty of attempting to assist in its damage. The index card further contained the name of the alleged Russian (T93-23 to T94-2).

The Government further introduced into evidence through Mr. Kuttner's testimony Government exhibit 4 (T97-16) which was described as:

"This is a letter from the United States Department in Washington to the United States Mission to the United Nations referring to an earlier communication that we sent to the State Department asking if the State Department had any objections to the inclusion of the name of this particular diplomat on the diplomatic list.

And this letter that I have in front of me is a response from the State Department saying that they have no objection to the inclusion in the above-mentioned list of the name of the following person, whose name is Vladimir Yezhov."

Based upon Government's exhibit 4 the witness concluded that:

"Vladimir Yezhov is an attache with the Permanent Mission of the Union of Soviet Socialist Republics of the United Nations." (T95-24 to T96-2)

On cross-examination Mr. Kuttner admitted that Government exhibit 4 was an unsigned copy of the original document (T97-15), and that he never saw the original (T97-17). The witness admitted that he had no other documents in his office pertaining to Vladimir Yezhov (T96-17 to 20). However upon further cross-examination this witness stated that he allegedly has in his files a copy of letter from his office requesting that the Department of Motor Vehicles in Albany, New York authorized diplomatic plates to the said Russian (T98-24 to T99-11).

This was the totality of the proof offered by the Government to establish that the alleged owner of the motor vehicle was "duly notified" to the United States as a "foreign official".

The procedure as outlined by Mr. Kuttner for obtaining diplomat licence plates from the State of New York was incorrect as evidenced by the New York State Vehicles Registration and Licensing Statute, Chapter 3, Section 125, which states that:



"Members or representatives of United States delegations. Individuals accredited to the United Nations who appear on the diplomatic immunity and privilege list of the United Nations as maintained by the Department of State of the United States are not subject to the provisions of the laws of this State as to registration of motor vehicles owned by them. In this category also are representatives to the United States having status equivalent to that of ambassadors."

Indeed as required by the aforesaid section one's name must be on the diplomatic immunity and privilege list of the United Nations as maintained by the Department of State of the United States to obtain diplomatic license plates for New York State. No such proof was exhibited by the Government that this procedure had been followed in instant case.

The procedure as outlined by the Government's witness as to how a "diplomat" obtains his name on the U.S. Government, "diplomatic privileges and immunity list" (T100-2 to 23) was not proven by the Government in the case of Valadimir Yezhov in that:

(1) No letter of request by the Soviet Government to the Chief of Protocol of the United Nations requesting diplomatic privileges and immunity was presented.

(2) No letter from the Chief of Protocol of the United Nations to the United States Mission forwarding the request of the Soviet Government was presented.

(3) No letter from the United States Mission to the United Nations to the United States State Department was offered into evidence.

(4) No signed document of the State Department was offered authorizing Vladimir Yezhov to be placed on the diplomatic immunity and privilege list of the United States.

(5) No letter of notification by the United States Mission to the United Nations to the Chief of Protocol of the United Nations was produced.

(6) The name of Vladimir Yezhov was not shown to appear on the United States Mission's diplomatic immunity and privilege list by production of that alleged document.

(7) No credentials to indicate that Vladimir Yezhov was on the diplomatic immunity and privilege list was produced by the Government.

(8) The diplomatic immunity and privilege list was not produced (T100-2 to T101-13).

The Government attempted to establish compliance with the statute by placing Government exhibits 3 and 4 into evidence and by having Mr. Kuttner testify as to the standard procedure of how a foreign national obtains his name on the diplomatic immunity and privilege list of the United Nations as maintained by the Department of State (T100-2 to 23).

It is submitted that no sufficient proof was offered by the Government to establish that the procedure had been properly followed in the case of Vladimir Yezhov.

The Court cannot take judicial notice that the procedure was followed as to Vladimir Yezhov upon basis of testimony merely stating what the procedure is in the regular course of business and by the introduction of Government's exhibits 3 and 4.

Section 1116 of Title 18 USC defines 'foreign official' in subsection (b) (2) as one "who is in the United States on official business". Absolutely no proof, at all, was introduced by the government to establish that Vladimir Yezhov was present within



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4 the United States at the time of the alleged offense. It is submitted  
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6 that it is mere speculation that he was ever in the United States at  
7  
8 any time. The fact that a car displays diplomatic license plates  
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10 registered in his name cannot be the basis of an inference therefrom  
11  
12 that the individual to whom it is registered is present within the  
13  
14 United States. It is not too difficult for one to loan his auto-  
15  
16 mobile to a third party while one leaves the confines of the United  
17  
18 States. C.F. Tot v. U.S., 319 U.S. 463 (1943) as to inferences.

19  
20 It is further submitted that the Government of the U.S.S.R.  
21  
22 has been known to be less than candid as to the identity of its  
23  
24 employees within the United States. It may be further questioned  
25  
26 whether in fact such an individual does exist, and if he does, whether  
27  
28 he was ever in the United States.

29  
30 At the end of the government's case these points were  
31  
32 intended to be raised by Defense Counsel in a Motion of Acquittal  
33  
34 as a matter of law. However, the Court refused to entertain any  
35  
36 argument on the proposed motion (T140-3 to T141-15).

37  
38 Further in summation, counsel for the defense in referring  
39  
40 to Vladimir Yozhov on the night of the alleged offense stated to the  
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42 Jury:

43  
44 "You can't assume, no one can assume that this man  
45  
46 was in the United States at that time." (T190-11 to 13).

47  
48 Upon objection by the government (T19-14 to 15) the Court  
49  
50 ruled in favor of the United States:

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52 "THE COURT: Yes. I don't think that the law requires, at  
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54 the time of the damage and injury of personal property, that the  
55  
56 man be in the United States at that moment, and I instruct the jury  
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that your argument on the law is wrong, as a matter of law.

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5 If this man left his property in the United States after he  
6 had entered the United States on official business, and if, as you  
7 suggested, he went overnight to Canada, overnight to Cuba, and  
8 while he was gone, his personal property was damaged or injured, and  
9 the other essential elements of this offense were shown, there would  
10 be a violation of this law. You are simply wrong as a matter of law.  
11  
12

13  
14  
15 Now drop that point, too.  
16

17 MR. PERSKY: Or even for a length of time, for months, he  
18 is out of the country, or if he was never in the country?  
19

20 THE COURT: Don't argue with me about the law. I said to  
21 drop the point. Don't argue with me about the law. This is my  
22 responsibility."  
23  
24

25 On the date of sentencing Defense Counsel prior to  
26 sentencing again raised the aforementioned issue in requesting  
27 what would be a JNOV (T8-22 to T12-5) (11/7/74).  
28  
29

30 It should be further mentioned, as was raised by defense  
31 counsel, 11/7/74, (T9-21 to T10-11) that the legislative history of  
32 Public Law 92-539 entitled: Act for the Protection of Foreign  
33 Officials and Official-Guests of the United States as contained in  
34 Senate Report No. 92-1105 states in the U.S. Code Cong. and Adm.  
35 News page 4318 that:  
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41 "The bill under consideration recognizes that the  
42 United States as a host country has a particular  
43 responsibility to protect the person and property  
44 of "foreign officials" including ambassadors,  
45 agents, employees and their families, while such  
46 persons are present within our territorial confines."  
47

48 Thus it is quite apparent from the plain meaning of the  
49 statute and the intent of Congress that the protection of the person  
50 and property of a foreign official, as defined in 18 USC116 (b) (2),  
51 is afforded only while such person is present within the United  
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States.

It is further submitted that absolutely no proof was offered by the government to indicate that the Russian was on official business as is also a requirement of the aforementioned statute.

By reason of the failure of the Government to establish that Vladimir Yezhov was duly notified to the United States as an officer or employee of the Russian government, the failure to establish that he was present in the United States at the time of the alleged offense, and the failure to establish that he was on official business at said time, the conviction below should be reversed.

POINT III

DEFENDANT'S MERE PRESENCE AT SCENE OF ALLEGED OFFENSE IS INSUFFICIENT TO FIND GUILTY PARTICIPATION EVEN IF DEFENDANT HAS KNOWLEDGE THAT A CRIME IS BEING PERPETRATED BY ANOTHER. THE FAILURE TO GRANT DEFENDANT'S REQUEST FOR THE GARGUILO CHARGE IN SUCH CIRCUMSTANCES WAS REVERSIBLE ERROR.

The Government's evidence of defendant's presence, taken in its best light, establishes that the defendant Spirn was present in an automobile parked either behind or in front of the alleged victim's automobile (T14-9 to 11). Testimony from the police officers further indicates that Vancier had at one point alighted from the defendant's vehicle and had a conversation with defendant. The police gave additional testimony that Vancier at the time of the conversation was in the process of pouring gasoline on the alleged Russian's auto when arrested (T14-9 to 11). A search of Spirn's car after the arrest and at the scene did not reveal any material that would indicate his participation. However, the officers testified that (at the Police Station) Spirn was found to have a pack of matches on his person and that he gave verbal indication that he knew Vancier (T19-22; T44-23 to 24). After the young men were released, they both went into defendant's automobile (T20-25; T21-3).

A classic case in regard to mere presence being insufficient to establish participation is U.S. v. DeVito, 68 F. 2d 837 (Circuit Court of Appeals, Second Circuit 1934). In



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5 DeVito, officers of the New York City Police Dept. entered a  
6 building in which they smelled the odor of alcohol. Upon en-  
7 tering the building they found there a group of men together  
8 all in plain sight of a large whisky still which was in operation.  
9  
10 Samples of mash and liquor were taken. The men refused to make  
11 any statements other than giving their names and addresses all  
12 of which addresses were found to be incorrect. At trial each  
13 defendant gave his version as to why he was present in the build-  
14 ing. None of the explanations were inculpatory. The Court held  
15 on page 839:  
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22 "The still was there, and it was unregistered.  
23 They were there also...Their presence there with  
24 the still in operation was a suspicious circum-  
25 stance. So was the fact that the addresses they  
26 gave did not prove to be correct when investigated.  
27 If suspicious circumstances were enough, the evi-  
28 dence would be sufficient to support the conviction.  
29 But that is not enough, of course. Graceffo v.  
30 U.S. (C.C.A.) 46 F.2d 852. Granted that the statute,  
31 section 3258 Rev. St. (26 U.S.C.A. 281), does not make  
32 it necessary to show possession, but that custody or  
33 control is enough, and that it would be unreasonable  
34 to believe that the still would have been in opera-  
35 tion with no one having it in custody or control;  
36 the evidence is woefully weak in any showing that  
37 these appellants or any of them had the custody or  
38 control of it. They might have. Any one of them  
39 might have. Davis might have; and so might one or  
40 more now unknown. They were unfortunate enough to  
41 be inside at the moment the officers entered...The  
42 proof that all (emphasis added) were guilty rises  
43 only to the level of suspicion, and, as there is  
44 nothing to distinguish one from another in this  
45 respect, the guilt of none was proved."  
46

47 In the case at bar the defendant's presence merely  
48 may have given rise to suspicious circumstances. There was no  
49 indication when he arrived--or if, in fact, he arrived with  
50 Vancier.  
51  
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Even if a valid inference could be drawn from the police officers' testimony that the container of gasoline was in the defendant's vehicle, nevertheless, the Court can take judicial notice that there was a gas shortage at that time; and although it may not have been the wisest choice to keep some additional gasoline in his vehicle, nevertheless, this fact cannot justify singularly or in combination with other circumstances, a finding of participation in criminal conduct.

There was testimony by the police officers that at the scene the defendant stated that he was having difficulty getting his car started (T65-2to3). This explanation was consistent with the defendant's movements as described by the police (T58-2to 3).

In Graceffo v. U.S., 46 F 2d 852 (Circuit Court of Appeals, Third Circuit 1931) the defendant with eight others were convicted for unlawfully manufacturing liquor and possessing such property used for manufacture of same and for maintaining a nuisance. The facts indicate that five prohibition government agents smelled alcohol at a given location and upon entering the premises at 7 A.M. found a 10,000 gallon still with all the necessary paraphernalia in operation with the men on the premises. The Court was satisfied that a still was being operated, "But who was guilty of violating the law is another question."

The Court held that the evidence was insufficient to sustain the conviction.



"There must ordinarily be something more than the mere presence of a person at a distillery at a particular time to justify an inference of guilt. Mere suspicion and conjecture are not sufficient." Murphy vs. U.S. C.C.A. 18 F2d 509, 512.

Actual participation with knowledge must be established for criminal responsibility. Such was not proven in the case at bar.

It has been held in U.S. v. Garguilo, 474 F2 872 Southern District of New York (1973) that where presence and knowledge must be proved by the Government, and where the evidence on aiding and abetting was close, the jury should be specifically informed "that mere presence and guilty knowledge were not enough unless they were convinced that the individual defendant was a participant and not a mere spectator.

In U.S. v. Terrell, 474 F2d 872, U.S. Court of Appeals, Second Circuit, Southern District (1973), at page 876, the Court noted that the trial Court in its charge to the jury did not adhere to counsel's request to give a Garguilo charge. This was held to be reversible error.

Similarly in the case at bar, counsel for the defendant requested the Garguilo charge; and similarly the court refused same (T152-6 to 15). It is submitted that this likewise constituted reversible error.

The law with respect to obtaining a conviction for aiding and abetting was summarized in Snyder v. U.S., 448 F2nd 716, U.S. Ct. of Appeals Eighth Circuit 1971 at page 718:

"By far the most important element is the sharing of the criminal intent of the principal, and this is concededly difficult to prove; nevertheless the Government must prove this sharing of criminal intent. *Johnson v. United States*, *supra*; *Mack v. United States*, 326 F.2d 481, (8th Cir.) cert. denied, 377 U.S. 947, 84 S.Ct. 1355, 12L.Ed.2d 309 (1964).

(3,4) Mere association between the principal and those accused of aiding and abetting is not sufficient to establish guilt, *Ramirez v United States*, 363 F.2d 33, 34, (9th Cir. 1966); *United States v. Joiner*, 429 F.2d 489, 493 (5th Cir. 1970); nor is mere presence at the scene and knowledge that a crime was to be committed sufficient to establish aiding and abetting. *Ramirez v. United States*, *supra*; *United States v. Garguilo*, 310 F.2d 249, 253 (2d Cir. 1962). Mere presence at scene of crime is not evidence of guilt. *Hicks v. United States*, 150 U.S. 442, 447, 448, 14 S.Ct. 144, 37 L.Ed. 1137 (1893)."

It is further submitted that the government failed in the case at bar to prove a sharing of criminal intent. At most the government proved mere presence of the defendant, which even if coupled with knowledge that a crime is to be committed, is insufficient. U.S. vs. Terrell, *supra*.



POINT IV

IT WAS ERROR FOR THE COURT TO ALLOW THE GOVERNMENT TO REFER TO THE FORMER ADJUDICATION OF THE DEFENDANT AS A JUVENILE DELINQUENT.

At the commencement of the afternoon session of the first day of trial, September 19, 1974, the government informed the Court and counsel for the defendant of its intentions to introduce a juvenile adjudication of the defendant to indicate the defendant's prior similar actions to establish a motive for the offense of which the defendant was now standing trial (Tr. Sept. 19, 1974, 48-13 to 15).

"Mr. Wile: The first question is with respect to the prior similar acts which I intend to introduce on the question of fact that it was a juvenile."

Mr. Wile further stated that it was his intention to introduce this evidence on his direct case (T18 to 23).

As authority for the above proposition the government stated to the Court that it was relying upon Unites States vs. Brettholz, 485 F2nd 283, (2nd Cir. 1973), which it also included in a Supplemental Requests to Charge (T48-24,25 and T49-2).

The Brettholz case sets forth the point of law that the jury may consider evidence of the past similar actions of a defendant in determining whether the defendant had a motive to commit the crime for which he was charged in the indictment before them. However, there is absolutely no reference, at all, in the Brettholz decision as to the admissibility of a prior juvenile proceeding as evidence to establish motive in the case for which the jury had been impaneled.

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4 In addition to those cases which were cited in the govern-  
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6 ment's Supplemental Requests to Charge, the U.S. Attorney further  
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8 informed the Court of the Case of the United States vs. Cohen, 489  
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10 F.2d 945 (1973) (T49-19,20). The Assistant United States Attorney  
11  
12 frankly admitted to the Court that although prior similar acts of  
13  
14 the defendant to establish a motive were not raised as an issue in  
15  
16 the Cohen case nevertheless such prior similar acts of a juvenile  
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18 were admitted into evidence by the Court (T49-23 to 25).

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20 In the Cohen case the defendant's counsel raised in his  
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22 opening the issue of motive. During the trial of the case the  
23  
24 government introduced into evidence actions of the defendant as a  
25  
26 juvenile which would indicate a motive. No objection was raised by  
27  
28 counsel during the trial to the introduction of such evidence by the  
29  
30 government. It is to be noted that there is no mention in the  
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32 opinion of the Cohen case of the government introducing any prior  
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34 juvenile delinquency proceeding against the defendant to establish  
35  
36 motive.

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38 In the case at bar the defendant's counsel vigorously  
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40 interposed an objection when he first was apprised of the govern-  
41  
42 ment's intentions to introduce a prior juvenile delinquency ad-  
43  
44 judication into evidence (T50-17 to 18). The Court then heard  
45  
46 argument of counsel for the defendant on this point (T50-25 to  
47  
48 T53-21).

49  
50 Although federal statute does not specifically state  
51  
52 that an adjudication of juvenile delinquency cannot be used in a  
53  
54 subsequent trial to indicate motive. Nevertheless, an anyalsis of  
55  
56 the history of the Act bespeaks a prohibition of the use of such  
adjudication.



In the case of Cotton vs. United States, 355 F.2nd 480 (1966) 10th Circuit, the Court of Appeals held that it was error for the lower court to admit into evidence a prior adjudication of juvenile delinquency of the defendant as the basis of impeaching the credibility of the witness.

The Court in analyzing the Juvenile Delinquency Act states on page 481 that:

"The federal statute applicable here section 5032, pertinently provides that in the event the juvenile is proceeded against by information". \*\*\* no criminal prosecution shall be instituted for the alleged violation." It does not expressly provide, as do some state statutes that adjudication of delinquency shall not be used against the delinquent in any other proceedings or trial. But, an adjudication of juvenile delinquency and commitment under the Act is not a conviction of or sentence for a crime. The very purpose of the Act is to avoid prosecution of juveniles as criminals. See Fagerstrom v. United States, 8 Cir., 311 F.2d 717. It was " the legislative intent that a juvenile delinquency proceeding shall result in the adjudication of crime. See Historical Note following section 5033, 18 U.S.C."\*

In Thomas v. United States, 121 F.2nd 905 (1941), the Court of Appeals District of Columbia did not allow evidence to be introduced by the defendant's counsel that a government witness, page 907, "had been arrested and tried for larceny in the Juvenile Court on or about July, 1939."

In discussing the Juvenile Delinquency Act of the District of Columbia, the Court stated on page 908 that:

"It would be a serious breach of public faith, therefore, to permit these informal and presumably beneficent procedures to become the basis for criminal records, which could be used to harass a person throughout his life. There is no more reason for permitting their use for such a purpose, than there would be to pry into school records or to compile family and community recollections concerning youthful indiscretions of persons who were fortunate enough to avoid the juvenile court."

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\* Word "not" obviously omitted between words shall result in original text.

In a more recent case in the District of Columbia circuit the Court of Appeals in Brown v. United States, 338 F.2nd 543 (1964) stated:

"Congress intended that a child found involved by the Juvenile Court should be insulated from the disabilities attending conviction for a crime. We therefore hold that "the language of the statute expressly forbids the interpretation that the disposition of a child in a juvenile court proceeding constitutes conviction of a crime," and that since "nothing short of conviction of crime is sufficient to warrant "impeachment..."

In the United States v. Tomaiolo, 249 F.2nd 683 (1957) the Court of Appeals of the Second Circuit held that it was impermissible for the government on cross-examination to be permitted to question the defendant as to whether he had been found guilty while in the service of being A.W.O.L. even though the defendant had testified on direct examination that he had been honorably discharged from the service.

In condemning the above cross-examination by the government, the Court held that a breach of military discipline is neither a felony nor crime involving moral turpitude and that:

"...these are the only types of offense which may be used for general attacks on credibility."  
(249 F2 683, 692)

In the United States v. DiLorenzo, 429 F.2nd 216 (1970) the Second Circuit reviewed a trial judge's advisory ruling that the government could use certain prior felony convictions for impeachment purposes on the issue of credibility against the defendant. The court on page 220 stated:

"Both of these convictions were for crimes affecting credibility, and when convicted appellant was not a minor..." (EMPHASIS ADDED)



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5 It is quite apparent therefore from a review of the  
6 philosophy of the Juvenile Delinquency Act and of cases within  
7 the Second Circuit such juvenile adjudications are inadmissible  
8 in evidence. The admission into evidence in the case at bar of  
9 the juvenile proceeding constitutes reversal error.  
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POINT V

THE COURT ERRED IN ALLOWING GOVERNMENT COUNSEL TO READ TO THE JURY THE TRANSCRIPT OF FINDINGS AND SPECIAL FINDINGS MADE IN A JUVENILE COURT IN A PROCEEDING AGAINST THE DEFENDANT AND ANOTHER TO PROVE THE DEFENDANT'S INTENT OR MOTIVE WITH RESPECT TO THE CHARGE IN THE INDICTMENT.

As the final evidence offered by the government in its case-in-chief the Assistant U. S. Attorney requested that he be permitted to read from the transcript of another proceeding which set forth the findings and special findings against the defendant and his co-defendant in said proceeding. Counsel for the defendant made a timely objection. The Court allowed the aforementioned findings to be read to the jury as evidence of the commission by the defendant of a similar act prior to that charged in the indictment (T. Sept. 19, 1974, 130-16 to 20). The Court then informed the jurors that the sole purpose of offering evidence of a similar act by the defendant was with respect to the issue of intent (T. Sept. 19, 1974, 130-22 to T131-9).

The Assistant U. S. Attorney then read to the jurors the transcript of findings and special findings of the judge who had heard the juvenile matter. Without informing the Court, the U. S. Attorney first read the findings of guilt by Judge Tyler against Mitchell Rein who was the co-defendant with Mr. Spirn in the juvenile proceedings (T. Sept. 19, 1974, 131-11 to T134-7). (21a)

After reading the special findings of Judge Tyler in regard to the adjudication of juvenile delinquencies against Mitchell Rein, the U. S. Attorney then proceeded to read the special findings of



the trial judge against Mr. Spirn (T. Sept. 19, 1974, 134-14 to T139-16). (21a)

The Assistant U. S. Attorney read the entire findings in regard to Mitchell Rein; he read the entire transcript of the findings as pertaining to defendant, Mr. Spirn, with the exception of the concluding remarks. It should be noted in arguing this point, counsel for the defendant does not concede that the introduction of evidence of the findings or adjudication of juvenile delinquency is admissible in a subsequent trial of defendant.

It is submitted that evidence of a prior similar act was not admissible in the case at bar to prove motive or intent in the crime of which the defendant stands accused. If a prior similar act of the defendant is proposed to be admitted into evidence to establish motive or intent the Court should carefully balance the value and extent of evidence of the prior similar act in contrast to the prejudicial effect such evidence would have on the minds of the jurors, in determining whether or not the defendant is guilty of the charge of which he is being tried. In the case at bar the evidence deprived defendant of a fair trial.

In the leading case of Boyd v. United States, 142 U.S. 450 12, S. Ct. 292, 35 L.1077 (1891), the Supreme Court of the United States reversed the decisions of the Courts below. The Court held that the trial Court erred in allowing into evidence three prior robberies of the defendants as the same was prejudicial even though the Prosecution deemed it necessary to establish the identity

and the intent of the accused. The Court held that the trial judge's charge to the jury could not remedy the harm done by such admission. The Court went on to state on Page 458 that:

"They were collateral to the issues to be tried. No notice was given by the indictment of the purpose of the government to introduce proof of them. They afforded no legal presumption or inference as to the particular crime charged. Those robberies may have been committed by the defendants in March, and yet they may have been innocent of the murder of Dansby in April. Proof of them only tended to prejudice the defendants with the jurors, to draw their minds away from the real issue, and to produce the impression that they were wretches whose lives were of no value to the community, and who were not entitled to the full benefit of the rules prescribed by law for the trial of human beings charged with crime involving the punishment of death. Upon careful scrutiny of the record we are constrained to hold that, in at least the particulars to which we have adverted, those rules were not observed at the trial below. However depraved in character, and however full of crime their past lives may have been, the defendants were entitled to be tried upon competent evidence, and only for the offense charged."

It is further submitted that the reading of such voluminous findings of the trial judge in the juvenile delinquency proceeding influenced the jury to return a verdict of guilty not based solely upon the defendant's conduct on the night in question of the crime charged.

In the case of the United States v. Dressler, 112 F. 2d 972 (cca 7th circuit 1940), the Court in discussing prejudicial evidence stated at page 977:

"It is inconsistent with our traditional conception of a fair trial to permit any information to go to the jury which might influence the jury to convict a defendant for any reason other than that he is guilty



of the specific offense with which he is charged."

In accord with this philosophy is the United States v. Myers, 244 F. Supp. 477 (U.S. District Court E. D. Pennsylvania 1955). The Court in discussing the discretion of the judge to allow prior criminal record of the defendant into evidence stated on Page 479 that:

"What more reasonable conclusion by a jury of laymen than that he was bent on doing precisely the same thing on the night of the crime. Indeed, although the evidence was not properly in the case to persuade the jury of guilt, its very vice is in its over-persuasiveness."

It is contended that the extended reading of the findings was over-persuasive and tended to illustrate the defendant's character and his propensity to perpetrate the crime for which he was charged. The Supreme Court of the United States in Michelson v. United States, 335 U.S. 469, 69 S.Ct. 213, 93 L.Ed. 168 (1948), at Page 475 stated:

"Not that the law invests the defendant with a presumption of good character, Greer v. United States, 245 U.S. 559 62 L.Ed. 469, 38 S. Ct. 209, but it simply closes the whole matter of character, disposition and reputation in the prosecution's case-in-chief. The State may not show the defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such facts might logically be persuasive that he is by propensity a probably perpetrator of the crime. The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so over-persuade them as to prejudice one with a bad general record and deny him a fair opportunity to defend against a particular charge. The overriding policy of excluding such evidence, despite its admitted probative value, is a practical experience that its disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice."

Even though the government may have satisfied the Court that the probative value of the prior similar act of the defendant was relevant and necessary to prove his participation in offense charged nevertheless the court should have prevented such testimony from being admitted into evidence because of its highly prejudicial effect upon the jury, thus denying the defendant a fair trial under due process of law.

In discussing this issue the Seventh Circuit in the United States v. Pate, 426, F.2 1083 (U.S.C.A. 7 Cir. 1970) at Page 1086 stated:

"The issue, in each instance, requires a determination whether the probative value of the evidence, for the purpose of which it was admitted, outweighs the prejudice to the accused in the admission of that evidence. Grunewal v. United States, 353 U.S. 391 420 77 S.Ct. 963, 1 L.Ed 2d 931 (1957); United States v. Fiererson, supra, 419 F.2d at 1022. When it must be said that the probative value of each evidence, though relevant, is greatly outweighed by the prejudice to the accused from its admission, then the use of such evidence by a state may rise to the posture of the denial of fundamental fairness and due process of law."

The dangers of allowing such evidence as aforementioned to be presented to the jury was succinctly stated in People v. Molineux, 168 N.Y. 264, 61 N.E. 286, 294, 62 L.R.A. 192 (1901) in which the Court stated:

"Such evidence compels the defendant to meet charges of which the indictment gives him no information, confuses him in his defense, raises a variety of issues, and thus diverts the attention of the jury from the one immediately before it, and by showing the defendant to have been a knave on other occasions, creates a prejudice which may cause injustice to be done him."



It is submitted that because of the length of the transcript of findings that was read to the jury, such testimony in effect constitutes substantive evidence of the offense on trial in the minds of the jurors. It is Hornbrook Law that evidence of collateral offenses must never be received as substantive evidence of the offense on trial, 63 A.L.R. 595.

Although the general rule is that a crime cannot be established by evidence of separate and distinct crimes not charged in the indictment, an exception is where intent or guilty knowledge are essential elements of the offense charged. It is submitted, however, that the length and detail of the juvenile findings confused the jurors as to the purpose for which it was introduced into evidence and that the judge's cautionary direction could not properly be understood in view of the length and perplexity of the findings.

In United States v. Spica, 413 F.2d 129 (CCA 8th Cir. 1969), the Court on Page 131 stated:

"This Circuit is, however, firmly committed to the rule that it is essential to the admissibility of another distinct offense that the proof be plain, clear, and conclusive, and evidence of a vague and uncertain character is not admissible. Kraft v. United States, (8 Cir. 1956) 238 F.2d 794; Paris v. United States, (8 Cir. 1919) 260 F.529."

In the United States v. Machen, (CCA 7th Cir. 1970) at page 526 the Court held that evidence of a prior similar offense must be "crisp, concise and persuasive". Likewise, see Kraft v. United States, 238 F.2d 794 (8th Circuit 1956), at pages 802 and

803. This was obviously not the method employed in the instant case where the prosecutor read long findings of the juvenile delinquency adjudication to the jury which included a detailed review of the evidence.

The strategy of the prosecution in introducing the prior juvenile adjudication as its final evidence, together with the length of the finding, emphasized the prior alleged similar act as a feature instead of a mere incident to simply indicate the defendant's possible motive. This procedure was condemned in Williams v. State, 117 S o. 2nd 473 (Supreme Court of Florida 1960). At Page 475 the Court revealed its reasons for reversal of the conviction when it stated that:

"Inasmuch as evidence of the later crime was admissible only because of its relevancy to the identity of the accused and the murder weapon and the similarity of the pattern defined in the two incidents, the question then arises whether or not the state was permitted to go too far in introduction of testimony about the later crime so that the inquiry transcended the bounds of relevancy to the charge being tried, and made the later offense a feature instead of an incident. This may not be done for the very good reason that in a criminal prosecution such procedure devolves from development of facts pertinent to the main issue of guilt or innocence into an assault on the character of the defendant whose character is insulated from attack unless he introduces the subject.

In the present case we are convinced that the testimony about the subsequent crime was so disproportionate to the issues of sameness of perpetrator and weapon and of design that it may well have influenced the jury to find a verdict resulting in the death penalty while a restriction of that testimony might have resulted in a recommendation of mercy, a verdict of guilty of murder of a lesser degree or even a verdict of not guilty."



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5 It is submitted that if the juvenile findings are evi-  
6 dentiary, then the Court must carefully scrutinize those parts  
7 which it deems should be admitted into evidence. In evaluating  
8 such a situation in People v. Jackson, 233 P 2nd 236 (Supreme  
9 Court of California 1950), the Court in discussing the relevancy  
10 of evidence of defendant's commission of other crimes quoted on  
11 Page 239 the principal California case in that regard when it stated:

12 "Of course, the 'relevancy of evidence that proves  
13 crimes other than that charged must\*\*\*be examined with  
14 care, due to the prejudicial nature of all such  
15 evidence', and the 'possibility of severing relevant  
16 from irrelevant portions should, in every case, be  
17 considered, thereby protecting the defendant against  
18 reference to other crimes where it has no tendency to  
19 establish facts pertinent to the proof of the crime  
20 charged.'" People v. Dabb, supra, 32 Cal. 2d at Page  
21 500, 197 P. 2d at Page 6.

22 It is therefore contended, that the defendant was denied his  
23 constitutional guarantees of due process of law and a funda-  
24 mentally fair trial by the court allowing the U. S. Attorney  
25 to read to the jurors the transcript of the prior juvenile  
26 delinquency findings and special findings to establish a motive.  
27 A simple reading by the Government to the jury of the complaint  
28 charging the delinquency, and a statement that the defendant  
29 was adjudicated a delinquent as charged, would have met the  
30 need of the government to establish motive, provided such evi-  
31 dence was legally admissible.  
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POINT VI

THE COURT ERRED IN ITS ANSWER TO THE JURY  
CONCERNING THEIR NOTE READING: "WHY DID  
NO CHARACTER WITNESSES COME FORWARD? IS  
IT CUSTOMARY?"

The jurors notified the Clerk that they had a note for the  
court to answer. The questions were:

"Why did no character witness come forward?  
Is it customary?" (T. Sept. 23, 1974, 242-9  
to 12).

The court then invited suggestions from counsel as to the  
appropriate answer. (T. Sept. 23, 1974, 242-13 to 14).

The court stated that answer to the juror's note would be:

"Whether to offer evidence of reputation by character wit-  
nesses is a matter of choice for each defendant. Some  
defendants offer such evidence; others do not. Their is  
no customary practice. In this instance the defendant  
elected not to offer such evidence" (T 242-17 to 22).

Counsel for the defendant advised the court that he was  
not in accord with the court's answer. Defendant's counsel sugges-  
ted that the reply of the court should be:

"The answer is there is no customary practice" (T 242-23  
to T 245-2).

It is submitted that the Court's statement or explanation,  
in effect, placed the burden of proof upon the defendant. There  
is no burden on the defendant to offer such evidence of character  
in the case at bar. The court's statement in effect created an elec-  
tion upon the defendant as to whether or not he should go forward  
and produce character witnesses. Since character is not at issue  
in the case, the court's informing the jurors as to the election



of the defendant to offer such evidence was prejudicial.

The court, in effect, delved into an issue of which the defendant had a right to exclude from the case. As was stated in Michaelson v. United States, 335 U.S.469, at 479:

"The price a defendant must pay for attempting to prove his good name is to throw open the entire subject which the law has kept closed for his benefit and to make himself vulnerable where the law otherwise shields him."

In discussing the judge's charge as to character testimony, Judge L. Hand in Nash v. United States, (C.C.A. 2d NY) 54 F. 2d 1006, 1007 wisely stated:

"...evidence of good character is to be used like any other, once it gets before the jury, and the less they are told about the grounds for its admission, or what they shall do with it, the more likely they are to use it sensibly. The subject seems to gather mist which discussion serves only to thicken, and which we can scarcely hope to dissipate by anything further we can add."

"Fundamental has been the rule that character is never an issue in a criminal prosecution, unless the defendant chooses to make it one." State v. Watson, 252 N.E. 2d 305 (Court of Appeals of Ohio 1969) Page 312-313.

For the aforementioned reasons the jurors received improper prejudicial information, and the judgment therefore should be reversed.

POINT VII

COUNSEL FOR THE DEFENDANT IS ENTITLED TO COMPENSATION FOR SERVICES RENDERED AT THE ARRAIGNMENT, MOTIONS TRIAL AND SENTENCING UNDER THE CRIMINAL JUSTICE ACT.

By letter dated September 6, 1974 the defendant's counsel advised Judge Wyatt that he was seeking approval of his being appointed counsel for the defendant under the Criminal Justice Act. Accompanying said letter was form CJA 20 requesting appointment of Robert S. Persky as counsel for the defendant under the said Act.

On September 12, 1974 at a pretrial hearing, the Hon. Inzer B. Wyatt considered defendant counsel's application to be appointed under the Criminal Justice Act. The Court after hearing argument of counsel refused to appoint counsel under the Act for reason that the Criminal Justice Act Plan of the Second Circuit, Southern District of the United States District Court, does not provide for counsel to be appointed who is not on the panel. The Court went on to state that it did not see any reason why it should appoint a New Jersey lawyer even if such lawyer is capable of defending the matter (T7-19to25).

Counsel for defendant informed the Court that he was a member of the bar of the Federal District Court Third Circuit and that he was on the panel of attorneys of the Third Circuit in accordance with the Criminal Justice Act (Tr.Sept.12,1974, 9-5to10).

In Bates v. Oddo, 479 F. 2nd 978 (1973) (CA 2nd Cir.),



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6 a request was made by appointed counsel for compensation for  
7 services and expenses under the Criminal Justice Act. The ap-  
8 pointed counsel contracted with another attorney who was not  
9 a member of the Plan. The Court of Appeals of the Second Cir-  
10 cuit held that where an individual was not on the Panel of at-  
11 torneys who were eligible for appointment under the Criminal  
12 Justice Act and further where no application to appoint said  
13 individual was made under the Criminal Justice Act to represent  
14 the defendant pro hac vice then the request of appointed coun-  
15 sel for compensation for services performed under the Act would  
16 be denied.  
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25 In the case at bar, defendant's counsel was appointed  
26 pro hac vice both for the purposes of arraignment (Tr. July 29,  
27 1974, 2-6 to 15), before Judge Charles E. Stewart, Jr., and for  
28 the purpose of trial (Tr. Aug. 13, 1974, 11-3 to 5), before Judge  
29 Inzer B. Wyatt.  
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34 It is therefore defendant counsel's contention that  
35 he complied with the requisites enunciated in United States v.  
36 Oddo, supra, and consequently he is entitled to compensation  
37 under the Criminal Justice Act.  
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CONCLUSION

For the aforementioned reasons the defendant's conviction should be reversed.

Respectfully submitted,

*R. S. Persky*

ROBERT S. PERSKY  
Attorney for Appellant  
40 Journal Square  
Jersey City, New Jersey 07306



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DOCKET ENTRIES

UNITED STATES COURT OF APPEALS  
FOR SECOND CIRCUIT

-----;  
U.S.A.

vs.

STANLEY SPIRN

UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF  
NEW YORK

CASE NO74 Cr. 705  
JUDGE Wyatt, J.

-----;  
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(Certification dated November 26, 1974  
signed by John Brascia, Assistant Clerk on  
behalf of A. Daniel Fusaro, Clerk, U.S.C.A.  
2nd Cir.)



COMPLAINT

Approved: JED S. RAKOFF  
Assistant United States Attorney

Before: HONORABLE C. J. HARTENSTINE  
United States Magistrate,  
Southern District of New York

74-6079

UNITED STATES OF AMERICA,

- v -

STANLEY SPIRN,

Defendant.

: COMPLAINT

: Violation of 18  
: U.S.C. §970 and 2

SOUTHERN DISTRICT OF NEW YORK, ss:

WILLIAM SCHROEDER, being duly sworn, deposes and says that he is a Special Agent of the Federal Bureau of Investigation, United States Department of Justice, and charges as follows:

On or about the 24th day of May, 1974, in the Southern District of New York, STANLEY SPIRN, the defendant, unlawfully, wilfully and knowingly, did attempt to injure, damage and destroy property located within the United States and belonging to, utilized and occupied by a foreign official and guest, to wit, a 1974 Plymouth bearing New York license plate 595DPL registered to Vladimir Yezhav.

The bases for deponent's knowledge and for the foregoing charges are, in part, as follows:

(1) An investigation, in the course of official duty, by the deponent.


(2) A statement by Patrolman John W. Sullivan to the deponent that he observed the defendant in the driver's seat of a 1969 Pontiac, registered to STANLEY SPIRN, with the back-up lights on, parked immediately behind the fore-said diplomatic vehicle at approximately 4:30 in the morning, that a few minutes later the other occupant of the Pontiac (Victor Vancier) exited from the Pontiac and began pouring what smelled like gasoline from a plastic container onto the afrosaid diplomatic car, which was parked in the vicinity of the Soviet Mission to the United Nations. Defendant and Vancier were then stopped by the patrolman.

(3) Statement of Helene Bacouri of the United States Mission to the United Nations that Vladimir Yezhov is attached in an official capacity to the Soviet Mission to the United Nations and was issued the aforementioned "DPL" license plate in that capacity.

3a  
COMPLAINT

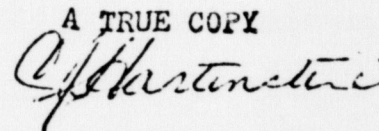
(4) Arrest records and photographs of defendant made in connection with his appearance at Jewish Defense League demonstrations, coupled with statements from Jewish Defense League spokesmen admitting plans for "harassment" of Soviet officials in the United Nations. Defendant is presently under indictment (SDNY) on a charge of assaulting an official of the Soviet Mission to the United Nations.

WHEREFORE, deponent prays that a warrant may issue for the apprehension of the above-named defendant and that he may be arrested and imprisoned or bailed as the case may be.

  
WILLIAM SCHROEDER

Sworn to before me this  
24th day of May 1974.

C.J. HARTENSTINE  
U.S. MAGISTRATE  
S.D.N.Y.

A TRUE COPY  




INDICTMENT

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

Plaintiff,

-v-

STANLEY SPIRN and VICTOR VANCIER,

Defendants.

INDICTMENT

74 Cr.

The Grand Jury charges:

On or about the 24th day of May, 1974, in the Southern District of New York, STANLEY SPIRN and VICTOR VANCIER, the defendants, unlawfully, wilfully and knowingly did attempt to injure, damage and destroy property located within the United States, to wit, a 1974 Plymouth automobile, and belonging to and utilized by a foreign official and official guest, to wit, Vladimir Yezhov, attache with the Permanent Mission of the Soviet Socialist Republics to the United Nations.

(Title 18, United States Code, Sections 970 and 2.)

FOREMAN

PAUL J. CUNNAN  
United States Attorney

CHARGE OF THE COURT

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## CHARGE OF THE COURT

(Wyatt, J.)

THE COURT: Mr. Foreman, ladies and gentlemen of the jury, this case is now about to be submitted to you for your decision on the issues of fact here involved, and of course your decision on those issues determines whether your verdict is guilty or not guilty.

In making your decision you act as ministers of justice and you discharge an obligation of citizenship which it is not too much to call sacred. In making your decisions, you are to act fairly and impartially. You should weigh the evidence calmly and objectively and without any bias or prejudice for or against the Government or for or against the defendant.

You, the jurors, are the sole and exclusive judges of the facts. It is your recollection which controls. And nothing that counsel have said this morning or at any other time in the trial and nothing that I may say during these instructions is to take the place of your own recollection, which is what controls.

In giving these instructions, bear in mind that I am explaining the applicable law. You jurors decide the issues of fact. Your duty is to take my instructions as to the law and apply them to the facts as you may find those



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facts to be.

That from time to time during the trial I may have been required to make rulings on the admissibility of evidence or otherwise is not to be taken as any indication of any view by me as to what your decision should be as to the guilt or innocence of this defendant.

You are not to assume that I have any opinion as to whether he is guilty or not guilty or any opinion as to the truth or falsity of the charge. The rulings on objections to evidence and other rulings made by me during the course of the trial are based on matters of law with which, of course, the jury has no concern.

In this connection, members of the jury, the fact that objections were made by counsel on one side or the other should not give rise to any inference, because counsel not only have the right but counsel have the legal duty to press whatever objections there may be to the admissibility of evidence, and also to make any other objections or requests which they feel may be in the interests of their client.

I would remind the jury also that what is said between the Court and counsel the jury should disregard, and you should remember as you doubtless do, that judges are only human. I have been impatient from time to time and it

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CHARGE OF THE COURT

1 is a fault on my part and you are asked to forgive and  
2 disregard it. Counsel on both sides have been able and  
3 devoted.  
4

5 I would also remind the jury that from time to  
6 time when I may have asked questions of a witness, it was  
7 only in an attempt to make something clearer for the jury  
8 and certainly was not meant to indicate any opinion by me as  
9 to the guilt or innocence of this defendant or as to the  
10 credibility of any witness.

11 As I explained yesterday, the indictment names  
12 Stanley Spira and Victor Vancier as defendants, and Mr.  
13 Vancier is not on trial here for reasons with which the  
14 jury has no concern. Only Mr. Spira is on trial here and  
15 only his guilt or not is to be determined, although in  
16 determining this, you will have to consider and determine  
17 the participation, if any, of Vancier.

18 Now, the indictment, as I have emphasized before,  
19 is merely an accusation. It is not evidence and no proof of  
20 guilt of the defendant. You should not give any weight to  
21 the fact that an indictment has been returned against the  
22 defendant. He has pleaded not guilty.

23 Also the fact that the Government is a party and  
24 that the prosecution is brought in the name of the United  
25 States of America does not entitle the Government or its



CHARGE OF THE COURT

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witnesses to any greater consideration than that accorded to any other party. At the same time, the Government and its witnesses are entitled to no less consideration. All parties, Government and individuals alike, stand as equals here before the bar of justice.

The Government has the burden of proving the charge against this defendant beyond a reasonable doubt. It is a burden which remains upon the Government throughout the trial.

A defendant is presumed to be innocent. He does not have any burden of proof. He does not have to prove his innocence. The presumption of innocence disappears only if and when you, the jury, are satisfied that the Government has sustained its burden to prove the guilt of the defendant beyond a reasonable doubt.

In weighing the evidence to determine whether there has been proof beyond a reasonable doubt, you will consider the quality and the substance of the evidence and not the quantity or the number of witnesses.

And now you have heard, certainly this morning, many times, the expression "reasonable doubt," and I shall try to give you some help as to what a reasonable doubt is:

It is a doubt founded on reason and arising from the evidence or the lack of evidence. It is a doubt which a

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CHARGE OF THE COURT

reasonable person has after carefully weighing all the evidence. It is a doubt which is substantial and not shadowy. It is a doubt which appeals to your judgment, your reason, your experience, your common sense.

Now, members of the jury, it is not an excuse to avoid the performance of an unpleasant duty. It is not sympathy for a defendant. A reasonable doubt is not a vague, speculative, imaginary doubt but such a doubt as would cause prudent persons to hesitate before acting in matters of importance to themselves.

Now, proof beyond a reasonable doubt does not mean proof to an absolute certainty or beyond all possible doubt. If that were the rule, few men or women, however guilty, would ever be convicted. It is practically impossible to prove to a person absolutely and completely any controverted fact which is not capable of being shown to a mathematical certainty, and in consequence, the law in a criminal case is that guilt of a defendant must be proved beyond a reasonable doubt but not beyond all possible doubt.

Now, the law under which the indictment is laid was passed by Congress out of concern, among other things, with the possible prejudice to the foreign relations of the United States of attacks on the property in this country of foreign officials, that is, foreign diplomats in this



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CHARGE OF THE COURT

country on their official business. The law reads, in relevant part, as follows:

"Whoever willfully attempts to injure, damage or destroy any property, real or personal, located within the United States and belonging to or utilized by a foreign official is guilty of an offense."

Now, in order to find the defendant guilty of the offense charged in the indictment, you must find that the Government has proved the following essential elements beyond a reasonable doubt: 1, that the defendant attempted to injure or damage or destroy personal property, in this case an automobile; 2, that the automobile belonged to or was utilized by a foreign official; 3, that the automobile was located within the United States when the attempt was made to injure or damage or destroy it; and 4, that the defendant acted willfully, meaning, among other things, that he knew that the automobile belonged to or was utilized by a foreign official. But the Government is not required to show that the defendant knew the name of the foreign official or his position.

Now, the indictment is short, I've read it before, but I think I ought to read it again so that you have in mind the charge as I give you my further instructions.

"The grand jury charges:

"On or about the 24th day of May 1974, in the

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CHARGE OF THE COURT

Southern District of New York, Stanley Spirn and Victor Vancier, the defendants, unlawfully, willfully and knowingly did attempt to injury, damage and destroy property located within the United States, to wit, a 1974 Plymouth automobile belonging to and utilized by a foreign official and official guest, to wit, Vladimir Yezhov, Attache with the Permanent Mission of the Soviet Socialist Republic to the United Nations."

And, as I have said before, the defendant has pleaded not guilty and that raises the issue to be tried.

Now the expression "foreign official." A foreign official is a person of a foreign nationality who is duly notified to the United States as an officer or employee of a foreign government and who is in the United States on official business.

To attempt to injure, damage or destroy property means to do some act amounting to more than mere preparation in an effort to bring about or accomplish injury, damage or destruction of that property.

Now, to do an act willfully means to do it knowingly and deliberately and with a bad purpose and motive. In determining whether a defendant has acted willfully, it is not necessary for the Government to establish that the defendant knew that he was breaking any specific or



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CHARGE OF THE COURT

particular law. And, as I have said a moment ago, it is not necessary for the Government to prove that the defendant knew the name or position of the foreign official who owned or used the automobile. The Government need only prove that the defendant knew that the automobile was owned or used by some foreign official.

Now, the evidence does not show that this defendant Spirn himself did the action to injure, damage or destroy the automobile. In this connection the Government relies on another law, a law which in relevant part reads as follows:

"Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal."

This means that not only is the person who commits an illegal act, the person usually called a principal, guilty, but anyone who aids or abets in the commission of the act is likewise guilty of committing that illegal act.

In order to find that a defendant aided or abetted another to commit the offense charged, you must find that the defendant in some way associated himself with the venture, that he participated in it as something he wished to bring about, that by his act or action, he

CHARGE OF THE COURT

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2 endeavored to make it succeed. This participation by a  
3 defendant may be shown by any act designed to promote or  
4 further the crime, even of relatively slight importance,  
5 which you find was committed by the defendant. But to find  
6 a defendant guilty of aiding and abetting, you must find  
7 something more than mere knowledge that the crime was being  
8 committed, since a mere spectator at a crime is not a  
9 participant.

10 It is not necessary, however, to find that the  
11 defendant himself did any of the acts since, as you just  
12 heard, participation in the crime can be found, for  
13 example, if you find that he counseled or aided or abetted  
14 or assisted another person to commit the crime.

15 Now, aiding and abetting means, as I said, an  
16 association with the venture. When people enter into a  
17 joint venture to accomplish an unlawful act, they become  
18 agents for one another in carrying out the joint venture.  
19 Hence the acts of one in the course of the joint venture and  
20 in furtherance of the common purpose are deemed to be the  
21 acts of all and all are responsible for such acts.

22 Accordingly, if you find, in accordance with  
23 these instructions, that a joint venture existed between  
24 this defendant and Vancier, then acts done in furtherance of  
25 the joint venture by Vancier may be considered against the



CHARGE OF THE COURT

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defendant.

Now, the Government has introduced evidence from which you might find that the defendant had earlier engaged in another act similar to the offense charged in this indictment. You may consider that evidence in determining whether the defendant had a motive to commit the offense charged in this indictment and whether the defendant specifically intended to commit the crime charged in this indictment. You may not consider the evidence of a similar act by this defendant as evidence that he had generally a criminal character or disposition.

Now, as you recognize, knowledge and intent exist in the mind. Since it is not possible to look into a person's mind to see what went on, the only way you have for arriving at a decision on such a question is for you to take into consideration all the circumstances and determine whether the requisite knowledge and intent were present at the time in question. Direct proof is unnecessary. Knowledge and intent may be proved by inference from all the surrounding circumstances.

Now, members of the jury, let's consider for a moment the credibility of witnesses. In weighing and determining the credibility of witnesses, you rely on your experience in the ordinary walks of life. You draw, as

CHARGE OF THE COURT

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practical men and women, on your past experience. You take into account any inconsistencies, contradictions, omissions and the like. That is the process of taking each witness and determining his or her credibility.

Now, members of the jury, the law does not compel a defendant in a criminal case to take the stand and testify. No presumption of guilt may be raised and no inference of any kind may be drawn from the failure of a defendant to testify.

Now, if a defendant, after being arrested or after being accused of a crime, makes some statement or some explanation which you find to be false, then you may consider as against him whether this is circumstantial evidence of a consciousness of guilt. It may be a reasonable inference that an innocent person does not invent or fabricate to establish his innocence. What significance, if any, to attach to such conduct, if you find there was such conduct, is, of course, entirely for you, the jury.

Now, I don't know whether we have drawn the distinction before in this case, but I should say that there are, as the law describes it, two kinds of evidence. Direct evidence and circumstantial evidence.

Direct evidence is where a person testified to what he did, what he saw, what he heard, what knowledge came



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CHARGE OF THE COURT

to him directly through his own senses. Circumstantial evidence is evidence of facts from which one may infer connected facts which reasonably follow in the common experience of mankind, and I think one simple example may illustrate the circumstantial evidence.

You remember the old story of Robinson Crusoe, how one day he saw fresh footprints in the sand and on the beach. Now, Crusoe did not see any man walking on the beach, but from the fact that he saw fresh footprints of a man on the beach he drew the inference that there had been another man walking on that beach. That is about all there is to circumstantial evidence. You infer, on the basis of reason and experience, from an established fact the existence of some further fact.

Now, members of the jury, there is no inference to be drawn against a party from the failure of that party to call a witness when it appears that his testimony would be merely cumulative or repetitious and have no greater value than that of witnesses who have in fact testified.

Now you will be glad to know that we have come to the end of these instructions, which for a simple case you might think are too long. But in conclusion, I want to say that each of you jurors is entitled to his or her own opinion. You should, however, exchange views among yourselves

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each with fellow jurors. That is the very purpose of jury deliberation, to discuss and consider the evidence, to listen to the arguments of fellow jurors, to consult with one another and to reach an agreement based solely and wholly on the evidence, if you can do so without violence to your own individual judgment.

Each one must decide the case for himself or herself, but you should not hesitate to change an opinion which after discussion with your fellow jurors appears to be mistaken in the light of the discussion viewed against the evidence and the law. You are not to yield your conviction, however, simply because you are outweighed or outnumbered. Your final vote must reflect your conscientious conviction as to how the case should be decided.

Now, members of the jury, your verdict must be unanimous. The jury is not to consider or in any way to speculate as to the punishment which the defendant may receive if he is found guilty. I emphasized that earlier this morning.

Under your oath as jurors, you cannot allow a consideration of the punishment which may be imposed upon a defendant if he is convicted to influence your verdict in any way or to enter into your deliberations. I repeat what I said earlier. The function of a jury is to determine the



CHARGE OF THE COURT

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guilt or innocence of a defendant on the basis of the evidence and the instructions of the Court. It is the judge alone, the Court, who has the duty of determining the sentence if there is a conviction.

The charge here, ladies and gentlemen, is most serious. The just determination of this case is important to the public in the United States and it is equally important to this defendant.

Under your oath as jurors, you must decide the case without fear or favor, and solely, as I have said, in accordance with the evidence and the law. I repeat what I said when the jury was being selected. It matters not whether you or I approve or disapprove of Russia or Russians or Russian diplomats. That is wholly beside the point. We are not here to pass judgment on what happens in foreign countries. The only issue is whether the defendant, on the evidence and the law, is guilty of the crime charged.

If the Government has failed to carry its burden, your sworn duty is to bring in a verdict of not guilty. If the Government has carried its burden, you must not flinch from your sworn duty, but you must bring in a verdict of guilty.

The guilt or innocence of the defendant is for you and you alone to determine. For the Government to

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prevail, it must prove the essential elements, as I described them, by the required degree of proof. If it succeeds, as I just said, your verdict must be guilty. If it fails, your verdict must be not guilty.

Your verdict will be returned orally by your foreman in open court. If during your deliberations you wish to see any of the exhibits, the foreman should send out a note by the marshal and we will send in the requested exhibits to you. If you should wish any testimony read to you, likewise send a request through the marshal and your request will be considered and, if granted, arrangements will be made.

Now we reach the point where we must excuse our alternate jurors. You appreciate that you have served as effectively as if you were a member of the twelve, because if for some emergency during the trial one of the twelve members of the jury should become unavailable by illness or some other emergency, if we don't have alternate jurors, we have to stop a trial at that point and start all over again. So alternate jurors are, in a sense, insurance against a disaster. Fortunately in this case, we have not had any disaster and so we excuse you two alternate jurors with the thanks of the Court. You may retire to the jury room and take your things so that you will be vacated when the jury



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retires in a few moments to deliberate.

(Two alternate jurors excused.)

THE COURT: Now, please, ladies and gentlemen of the jury, remain in the jury box patiently for just a few moments and in silence while I see counsel and the reporter at the side bar for any last minute problems of law.

(At the side bar.)

THE COURT: Mr. Wile?

MR. WILE: One argument was made this morning that I failed to anticipate, I must say. That is about uncalled witnesses equally available to both sides.

If it is convenient for your Honor to make that charge now, I request it, and I apologize. I didn't anticipate it and I didn't think it was going to come up in this trial.

THE COURT: Any objection?

MR. PERSKY: I object, your Honor. I stated specifically that the prosecutor has to prove his case beyond a reasonable doubt, that the burden of proof is on the prosecutor and not on the defendant. The prosecutor has to produce the witnesses, not the defendant.

I think I covered that quite adequately. I think to state that at this time would spotlight that issue that was definitely stated.

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Now, the Government is now about to offer evidence for the consideration of the jury of what are said to be, or what is said to be, a similar act by this defendant before May 24th.

It is being offered and it is being received solely on the issue of the intent of the defendant in respect of the charge in the indictment which is here on trial, particularly the element of wilfulness.

All right.

MR. WILE: The first thing I am going to read is June 17, 1974, and the speaker is Judge Twloer, a judge of this court.

"The Court: Well, I'm going to find and make special findings even though I haven't been requested to.

"Under the rules, I think it would be useful to these young men and all concerned if I did."

I'm sorry. The name of the case is United States of America v. Mitchell Rein and Zelig Spirn.

"On March 15, 1973, on a Thursday at about nine o'clock in the evening. Mitchell Rein and another were following one Honorable German Kosenkov, a Secretary of the second rank at the Soviet Mission to the United Nations. As such, he had been since September 15, 1971.

"Kosenkov was in the habit, as he told us, of



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2 of walking home directly along Third Avenue from the Soviet  
3 Mission on East 67th Street to his house on East 87th Street.  
4 As Kosenkov stopped for the red light at the corner of  
5 Third Avenue and 72nd Street, he had been several seconds  
6 before at least aware of two men pursuing him. He had con-  
7 tinued walking until he hit the corner of 72nd and waited  
8 for the light.

9 "As he was waiting at the light, he was set upon  
10 by these two men and apparently Kosenkov was the victim  
11 of some touching by one or both of the men, but most impor-  
12 tantly, from his testimony, he was hit on both sides as both  
13 men threw upon him a red substance which later, as a stipu-  
14 lation by counsel shows, the FBI laboratory has determined to  
15 be beef blood or cattle blood.

16 "Shortly after this blood was thrown upon him  
17 covering his raincoat and his face and head, the two per-  
18 petrators fled down 72nd Street toward Lexington Avenue.

19 "Kosenkov was offered assistance by a male passer-  
20 by and cleaning himself with his handkerchief, going to the  
21 nearby Soviet Mission, where he changed clothes to an extent.

22 "At the insistence of his First Secretary, Mr.  
23 Skotnikov, the two men later went to the 19th Precinct,  
24 which is located right across, virtually, from the Soviet  
25 Mission or Embassy, as it is sometimes called, the precinct

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being located at 153 East 67th Street.

"While the victim Kosenkov was interviewed in the so-called "muster room," which is the first room you come into when you come into the first or front door of the 19th Precinct.

"He observed in the doorway or just inside the doorway of an adjacent or second room two men. He identified by gesture, at least, the two men as the men he believed to have been the perpetrators.

"However, that evening, Kosenkov was also asked to go into the room and as he went into that second room he was able to recognize the two men as the perpetrators even though he had not then or apparently even knew, I gather, knew their names.

"Sometime thereafter, the police showed Kosenkov 15 to 20 photos. As he told us on the stand today, Kosenkov was only able to make a positive identification of the defendant Mitchell Rein only. He was unable to make a positive identification of anybody else. Most particularly the defendant Spira.

"Now, on the evening in question, therefore, I conclude as ultimate findings of fact that the defendant Mitchell Rein was one of the two perpetrators who assaulted Second Secretary Kosenkov at the corner of 72nd Street by



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1 jiggmg 45

2 throwing this liquid form, blood of cattle upon the Second  
3 Secretary.

4 "I find further that it was done wilfully and  
5 knowingly by the two defendants in question: that they  
6 intended this result: they knew what they were doing,  
7 and it didn't happen by innocence or mistake."

8 THE COURT: All right. Leave out the evidence  
9 and --

10 MR. WILE: No, your Honor. That is only one por-  
11 tion. There is a second finding.

12 THE COURT: All right.

13 MR. WILE: Thank you.

14 "The Court: Well, gentlemen, the issues presented"  
15 this is from the following day --

16 MR. PERSKY: May we have the page and line number  
17 where it starts and ends?

18 THE COURT: Yes.

19 MR. WILE: June 18, 1976. It is page --

20 THE COURT: 1974?

21 MR. WILE: Yes. It is page 135 of the transcript.

22 THE COURT: All right.

23 "The Court: Well, gentlemen, the issues presented  
24 in the specific case of the defendant Zelig Spizn are, of  
25 course, different than those presented in case affecting

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Mr. Rein. However, I adopt the background findings of fact which I entered on the record last evening with respect to the case of Rein, and I turn to the specific issues which, of course, are quite different in the case of Zelig Spirn.

"The record indicates, as has been argued by Mr. Persky, that at no time did German Kosenkov ever make a positive identification of Mr. Spirn, despite many opportunities given to him by police and later by the prosecutor.

"Coincidentally, Mr. Kosenkov, both out of Court and in Court yesterday, was unable and unwilling to make a positive identification of Spirn; indeed, as Mr. Persky has argued today, what happened was that yesterday Kosenkov, here in the courtroom, paused briefly over the person of one Mr. Brodsky, who is a friend of Mr. Persky, and who was sitting at the time next to Mr. Rein. And as I understood Mr. Kosenkov, through the translator, he thought possibly this gentleman by the name of Brodsky might have been the other man, but he could by no means be sure.

"On the other hand, we have had in Court a positive identification of the Defendant Spirn by Detective Greenberg. And incidentally, it was brought out today that Greenberg had made the same identification of a photograph shown to him in the grand jury of Spirn, but he was unable to be certain of the photograph in the grand jury of the



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Defendant Rein. I am aided in my determination by my finding that Greenberg and Kosenkov were not only substantially truthful, but impressive witnesses.

"For various reasons, they both impressed me of being gentlemen of rather strong minds. And they were unwilling to be led by either counsel or the Court into the directions that they did not seek to be led.

"There are, of course, some little obscurities or faint ambiguities to be found in the testimony, as they usually are, in my experience at least. I cannot remember a case when there wasn't such.

"For example, as I recall the testimony of Greenberg, he seemed to recall that the victim Kosenkov fell down or was pushed down.

"As he put it, was on the floor at the corner of 72nd Street.

"As was pointed out here today, no one ever really got any evidence to that effect from Kosenkov himself.

"However, I note no one ever even pushed him on this point. My own conclusion of the facts of that particular instant come down to this: I don't think really Greenberg is quite correct in suggesting that Kosenkov was actually floored or he fell down.

"I think what happened was, Greenberg made his

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1 observations at a time when Kosenkov instinctively was duck-  
2 ing or hunching himself down after he had received, from  
3 both sides, dosages of this liquid, which we now know was  
4 beef blood or cattle blood.  
5

6 "I think perhaps, therefore, that Greenberg was  
7 mistaken about his recollection there. But where I do not  
8 think Greenberg is mistaken is his testimony as to the  
9 continuity of the events that transpired after his initial  
10 observations, when he was riding in the cab with fellow  
11 Officer Detective Hands, Mr. Whitmore and the female companion  
12 of Mr. Whitmore.

13 "The testimony was, and I so find, that Greenberg  
14 and Hands had the cabby follow the two fleeing persons down  
15 72nd Street towards Lexington Avenue. Further, I find that  
16 the two individuals who finally were apprehended after the  
17 officers got out of the car and yelled "Police! Stop!" and  
18 then the youth, who started to turn and run in another di-  
19 rection, stopped as directed. They were put up against the  
20 wall and padded down, and that those two youths were not only  
21 Rein, but Mr. Zelig Spirn.

22 "Now, this finding is made on the basis of not  
23 only the testimony of Detective Greenberg, but on the later  
24 pedigree information which Officer or Patrolman Cannoneilli  
25 took from Rein, and in our case, which concerns us this



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morning, Mr. Zelig Spirn.

"True, Cannonelli got the spelling of his name wrong. He got the address -- the address in Queens a little bit gobbled. But I find beyond any reasonable doubt that Cannonelli positively identified the defendant Spirn. And that Spirn was the man that fled. And that the only inference seen reasonable to me under the circumstances is that that fleeing is an indicator of guilt of the assault in question.

"So that on those two lines of testimony, the continuity of events and the flight and the positive identification which Mr. Greenberg was able to make in the courtroom, I find with no difficulty in concluding as an ultimate fact that Zelig Spirn was one of the assaulters."

THE COURT: Do we need anything more?

MR. WILE: Yes, your Honor, there is about another two pages.

THE COURT: I don't think you need anything more.

MR. WILE: Can I read the punch line?

THE COURT: All right.

MR. PERSKY: Note my objection.

MR. WILE: Page 190, line 24:

"Therefore, all all the essential elements of this Section 12, Title 18 of the U.S. Code have been proved beyond

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1 a reasonable doubt"--

2 MR. PERSKY: I object. This is a different sec-

3 tion.

4 THE COURT: Your objection has been noted and it

5 has been overruled.

6 Therefore, you will take your seat.

7 MR. PERSKY: But the judge is now interpreting a

8 different statute.

9 THE COURT: We don't care what he is interpreting

10 as a matter of law. I have explained to the jury that

11 this is offered solely for the jury's consideration as,

12 according to the Government, a similar act in connection

13 with the issue of this defendant's intent.

14 Now be seated. Your objection is noted.

15 MR. WILE: "I find the Defendant Spirn guilty."

16 THE COURT: All right.

17 Now, Mr. Persky, do you want me to tell the jury

18 the status of the finding at the moment?

19 MR. PERSKY: Yes, your Honor.

20 THE COURT: The finding was made in a case in this

21 court, as you have just heard. The defendant Spirn has

22 taken an appeal to the Court of Appeals and the matter is

23 now in the appellate court.

24 All right.

25



NOTICE OF MOTION OF ELECTRONIC SURVEILLANCE

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA :

Plaintiff

No. 74 Cr 704

vs.

STANLEY SPIRN, et al

Defendants

NOTICE OF MOTION  
OF ELECTRONIC SURVEILLANCE  
OF DEFENDANT'S ATTORNEYS

SIR:

PLEASE TAKE NOTICE, that the undersigned will move this Court, the Honorable Inzer B. Wyatt, United States District Judge presiding, at the United States Court House, Foley Square, New York, New York on the 16th day of September, 1974 at 10 A.M. on that day, or as soon thereafter as Counsel can be heard, for an Order directing the United States Attorney to disclose to Counsel for the defendants

(1) whether any of the defendant, any of their attorneys or aides, or any other attorneys or aides who have had any connection with this or any related case have been overheard by means of any wiretaps, electronic surveillance or any other surreptitious means, by any agency of the United States, or of any state, or of any foreign nation, or of any international organization. (2) whether any wiretaps, electronic surveillance or other surreptitious means of overhearing were employed on any premises owned, rented or regularly used by any of the above specified defendants, lawyers or aids by any of the above named governments, agencies or organizations, their premises including but not limited to those utilized by

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the Jewish Defense League, Inc.

The defendants' attorneys include, but are not limited to, the following:

Robert S. Persky, 40 Journal Square, Jersey City,  
New Jersey.

Robert P. Leighton, 15 Park Row, New York, New York.

Bertram Zweibon, 22 East 40th Street, New York,  
New York.

Barry Ivan Slotnick, 15 Park Row, New York, New York 10038.

In the event that any such wiretapping, electronic surveillance or surreptitious overhearing did occur, defendants respectfully request this Court to order the Government to afford counsel for defendants an opportunity to inspect and copy all the records of any such conversations. If any of the records of any such conversations are not in existence, defendants respectfully request the Court to order a hearing to determine the reasons why such records are not in existence.

In the event that any such wiretapping, electronic surveillance or surreptitious overhearing did occur, defendant respectfully request a hearing to determine whether the indictments should be dismissed or other appropriate relief granted.

Dated: Jersey City, New Jersey  
August 28, 1974

Yours, etc.,

ROBERT S. PERSKY, ESQ.

Attorney for Deft. Spira



ACT FOR THE PROTECTION OF FOREIGN OFFICIALS  
AND OFFICIAL GUESTS OF THE UNITED STATES

U.S. CODE CONG. AND ADM. NEWS P. 4316 TO 4322 (1972)

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**ACT FOR THE PROTECTION OF FOREIGN OFFICIALS  
AND OFFICIAL GUESTS OF THE UNITED STATES**

*P.L. 92-539, see page 1255*

House Report (Judiciary Committee) No. 92-1268,  
July 31, 1972 [To accompany H.R. 15883]

Senate Report (Judiciary Committee) No. 92-1105,  
Sept. 8, 1972 [To accompany H.R. 15883]

House Conference Report No. 92-1485, Oct. 2, 1972  
[To accompany H.R. 15883]

Cong. Record Vol. 118 (1972)

**DATES OF CONSIDERATION AND PASSAGE**

House August 7, October 11, 1972

Senate September 18, October 2, 1972

The Senate Report and the House Conference Report are set out.

**SENATE REPORT NO. 92-1105**

**T**HE Committee on the Judiciary, to which was referred the act (H.R. 15883) to amend title 18, United States Code, to provide for expanded protection of foreign officials, and for other purposes, having considered the same, reports favorably thereon with amendments, and recommends that the bill as amended do pass.

**PURPOSE OF BILL AS AMENDED**

H.R. 15883 as it passed the House of Representatives recognized the international obligations of the United States to resident diplomatic, consular and other foreign government personnel and their families present within our borders by the establishment of Federal criminal sanctions covering violations against their person and property. The first series of committee amendments extend this umbrella of Federal protection to other "official guests" of the United States as designated by the Secretary of State so as to authorize expanded protective, investigative and other law enforcement services for the benefit of private foreign citizens visiting our country pursuant to official recognition by the United States.

The second series of committee amendments would add a new part to title VI of the Foreign Service Act of 1946, as amended, relating to personnel administration. The stated purpose of the new part is "to provide officers and employees of the Service and their survivors, a grievance procedure to insure the fullest measure of due process, and to provide for the just consideration and resolution of grievances of such officers, employees, and survivors." (Sec. 691)

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STATEMENT

Acts of physical violence against members of the diplomatic corps and other foreign officials and official guests in our country are alarming and can pose a real threat to the free intercourse between the United States and other nations of the world.

During the period between January through October 1971, there were seventy-nine major documented incidents against foreign diplomatic, consular, and semi-official officers and personnel in the United States.<sup>1</sup>

A review of existing criminal sanctions has disclosed that the Federal Government is currently without a criminal jurisdictional nexus over such matters.

Provisions for increased protection of diplomatic, consular and other foreign government personnel and their families would permit a direct discharge by the United States of its international obligations as a host country, whereas presently, in most instances of interference with such persons, the Federal Government can only encourage local enforcement of the law.

Of course, the prime responsibility to investigate, prosecute and punish common law crimes such as murder, kidnapping and assault should remain in the several States. This legislation will extend to the United States jurisdiction, concurrent with that of the States, to proceed against only those acts committed against foreign officials which interfere with its conduct of foreign affairs.

In broad terms, the instant measure would—

(1) Make murder or manslaughter of a foreign official, a member of his family, or an official guest, or conspiracy to murder such individual, a Federal offense punishable as a felony.

(2) Make the kidnapping of a foreign official, a member of his family, or an official guest, or conspiracy to kidnap such an individual, a Federal felony if committed anywhere in the United States.

(3) Make the assaulting, striking, wounding, imprisoning or offering of violence to a foreign official or an official guest a Federal offense punishable as a felony.

(4) Make the intimidation, coercion, threatening, harassment or willful obstruction of a foreign official or an official guest a Federal offense punishable as a misdemeanor.

(5) Prohibit certain demonstrations within one hundred feet of foreign government buildings for the purpose of intimidating, coercing, threatening or harassing any foreign official or official guest, or willfully obstructing such individual, and make this punishable as a misdemeanor.

(6) Make the willful injury, damaging or destruction, or attempted injury, damaging or destruction, of real or personal property within the United States belonging to or used or occupied by a foreign government, foreign official, international organization, or official guest, a Federal offense punishable as a felony.

(7) Make several changes in the Federal kidnapping law as it will apply generally. In this regard, the law is amended to make

<sup>1</sup> Letter to Hon. John L. McClellan, Chairman of the Subcommittee on Criminal Laws and Procedures, from David M. Abshire, Assistant Secretary of State, and supporting documents, which are in the files of the Subcommittee.



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the thrust of the offense the kidnapping itself rather than the interstate transporting of the kidnapped person. This effort to clearly differentiate the question of what is criminal from the question of what criminal behavior falls within Federal jurisdiction not only makes the sanction more rational but also has the practical effect of assuring that a kidnapping which occurs in a hijacking situation is an extraditable offense from a country which does not recognize an offense keyed to interstate transportation.

H.R. 15883 passed the House of Representatives on August 7, 1972, by a vote of 380-2. It has its genesis in companion bills H.R. 10502 and S. 2136, introduced in accordance with an executive communication (*infra*). These bills, as introduced, covered not only foreign officials, but also public officials of the United States. After considering the legislation the House Committee on the Judiciary concluded that the changes in the law proposed as to Federal officials and employees should be considered separately from that proposed for foreign officials and diplomatic personnel. Thus, the present bill, H.R. 15883, was subsequently introduced to cover foreign officials in this manner, including provisions recommended by the executive communication as to foreign officials and omitting the provisions relating to public officials of the United States. It should be noted that the penalty provisions in the reported bill differ from those proposed in the executive communication.

On September 7, 1972, Senator McClellan introduced Amendment No. 1488 for himself and Senator Hruska to H.R. 15883 and observed:

Mr. PRESIDENT: I send to the desk a proposed amendment to H.R. 15883, an "Act for the Protection of Foreign Officials". This amendment is rooted in my profound concern for the tragic events of Munich during the past week.

The bill under consideration recognizes that the United States as a host country has a particular responsibility to protect the person and property of "foreign officials", including ambassadors, agents, employees and their families, while such persons are present within our territorial confines. However, the measure would not offer any expanded protection for foreign citizens, who might visit our shores as official guests of our country as members of an Olympic contingent. Thus, had the situs of the kidnapping and subsequent murder of the Israeli standard-bearers been Milwaukee rather than Munich, our response would have been limited to state law enforcement resources. No federal jurisdiction would exist despite the fact that our responsibilities would at least parallel those which exist vis-a-vis visiting diplomatic personnel.

It is still too early to judge the actions of West Germany in response to this Arab terroristic lunacy. However, it is at least clear that the state governments of West Germany now realize that their federal government cannot be limited to a mere consultative role with regard to such matters. State governments simply cannot cope alone with crimes involving international politics and diplomacy.

Hopefully, we will never again witness the political assassination of visiting athletes in any country. Nonetheless, our criminal laws must recognize such behavior as a violation of

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Federal as well as state law and authorize the use of Federal law enforcement resources in such cases.

The amendment I propose will extend the umbrella of Federal protection to cover "official guests" of the United States as designated by the Secretary of State so as to include visiting athletes in international competition.

The committee finds merit in Senator McClellan's observations and proposal and notes that it will also operate to protect the rights of visiting artists, academic and scientific groups, and other groups and individuals who ought not be beyond the pale of Federal concern. Accordingly, Amendment No. 1488 has been incorporated in the reported bill, H.R. 15883.

The committee has also amended the House measure to deal with personnel administration. Pursuant to the provisions of section 692 of the bill, the Secretary of State is required to promulgate regulations providing for the consideration and resolution of grievances which do not "in any manner alter or amend the provisions for due process." This section also provides that informal procedures for the resolution of grievances shall be established by agreement between the Secretary of State and the organization accorded recognition as the exclusive representative of the officers and employees of the Foreign Service. In the event a grievance is not resolved under the informal procedures within 60 days, the grievant shall be entitled to file a grievance with the Grievance Board.

Under the terms of the bill, the Grievance Board is to be composed of "independent, distinguished citizens of the United States well known for their integrity, who are not officers or employees of the Department, the Service, the Agency for International Development, or the U.S. Information Agency." One of the members shall be appointed by the Secretary of State; another by the organization "accorded recognition as the exclusive representative of the officers and employees of the Service"; and the third shall be appointed by the other two members from a roster of 12 "independent, distinguished citizens of the United States \* \* \*" agreed to by the Secretary and the organization representing the officers and employees of the Foreign Service. This roster is required to be maintained and kept current at all times. Provision is also made for the establishment of additional panels of three members as may be necessary "to consider and resolve expeditiously grievances filed with the board \* \* \*."

All expenses of the Board, including compensation for such officers and employees as the Board considers necessary to carry out its functions, are to be paid out of funds appropriated to the Department of State.

A grievance shall be barred unless it is filed within a period of 8 months after the occurrence or occurrences giving rise to the grievance, except that if the grievance arose prior to the date the regulations are first promulgated or placed into effect, and not considered and resolved, it may be filed within a period of 1 year after the date of enactment of this new part.

The Board is required to conduct a hearing on any case filed with it and such hearings shall be open unless the Board determines otherwise. The grievant and his representative are entitled to be present at the hearing, testimony is given by oath or affirmation, parties are entitled to examine and cross-examine witnesses unless the Board finds such



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interrogatory irrelevant, requested witnesses must be made available by the Department in person or by deposition, or the facts at issue shall be construed in favor of the grievant, and hearings shall be transcribed verbatim.

Any grievant, witness or other person involved in a proceeding before the Board "shall be free from any restraint, interference, coercion, discrimination or reprisal."

In considering a grievance, the Board shall have access to "any document or information considered by the Board to be relevant," including security records "under appropriate security measures."

If the Board resolves that a grievance is meritorious (in any case that does not relate directly to promotion, assignment or selection out of an officer or employee), it shall direct the Secretary to grant such relief as the Board determines proper and "the resolution and relief granted by the Board shall be final and binding upon all parties." In the case of a grievance directly related to any promotion, assignment or selection out, the Board shall certify its resolution to the Secretary of State together with such recommendations for relief as it deems appropriate. The Board's recommendations are to be final and binding on all parties, except that the Secretary may reject a recommendation "only if he determines that the foreign policy or security of the United States will be adversely affected" and fully documents his reasons therefor.

Section 693 provides that a grievant may not file a grievance under this new part if he has formally requested (prior to filing a grievance) that his grievance be considered under a provision of a law, regulation or order other than those provided under this part.

Any actions taken by the Secretary of State or the Board pursuant to this title are subject to judicial review and the Secretary is required to promulgate and place into effect regulations to establish and appoint members of the Board not later than 90 days after the date of enactment of the pending bill.

During the past year the Congress has received many complaints regarding alleged shortcomings in the grievance procedures in the Department of State. Some complaints have come from individuals who have severed their relationship with the Department, others from individuals who are still within the Department.

In recognition of many of these complaints on October 6, 1971, Senator Bayh (for himself and Senators Beall, Brooke, Case, Church, Cooper, Cranston, Hart, Hartke, Humphrey, Kennedy, Moss, Muskie, Pastore, Scott, Stevenson, Tower and Tunney) introduced S. 2659 as a substitute for a bill (S. 2023) which he had introduced earlier that year. A similar bill (S. 2662) was introduced by Senator Moss (for himself and Senator Miller). The Committee on Foreign Relations held public hearings on these grievance bills on October 7 and 18, 1971. The hearings have been printed and are available to the Congress and the general public.

These hearings documented persuasively many of the charges about the shortcomings in the grievance procedures of the Department of State. To give but a few examples, it was shown that: until 1971, under a procedure which supposedly guaranteed the right to a hearing, the State Department had permitted only one hearing in fifteen years despite hundreds of complaints; the Department's response to legislation, the "Interim Grievance Procedures", authorized a Board which





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consists of nine members, all of whom were chosen by the Secretary after perfunctory consultation with employee groups; the procedures themselves put numerous obstacles in the grievant's path to a hearing and further obstruct his effort to obtain relevant documents and witnesses. Since conclusion of the hearings, numerous letters to the Chairman of the Foreign Relations Committee as well as court cases have indicated that the Department has "interpreted" the Interim Grievance Procedures to suit its own needs. For these reasons, simple explicit legislation is needed to provide an independent standard of due process.

A modified version of S. 2659 was reported by the Committee on Foreign Relations as an amendment to the Foreign Relations Authorization Act of 1972. In its report to the Senate (Senate Report 92-754 on S. 3526), the Committee commented as follows on the amendment:

"The committee is aware of the concern of the Department of State at the enactment of this provision. The Department has established an 'interim grievance' procedure system which it has expected in due course would be revised, depending upon agreements to be worked out between management in the Department and such organization as may be accorded recognition as the exclusive representative of officers and employees of the Foreign Service. There have been unavoidable delays in selecting the organization to represent officers and employees and it may be anticipated that more time will elapse before representatives of such a group and the management of the Department will be able to develop mutually acceptable grievance procedures. Accordingly, the committee decided to adopt compromise language worked out by various sponsors of S. 2659.

The language of S. 2659 was further modified during the debate in the Senate and this bill is the verbatim version which was incorporated in S. 3526 as it was passed by the Senate on May 31, 1972. In the conference which was held on S. 3526, the House conferees argued that they could not accept the language, since they had not held hearings on State Department grievance procedures. Accordingly, the Senate conferees reluctantly decided to recede. It should be noted, however, that the House conferees agreed that they would take up the subject of grievance procedures in the Department of State and hopefully act on legislation on the subject during this session of the Congress so that in due course there could be a conference on the House and Senate versions of the language appearing in the bill accompanying this report. With this in mind, the Committee on Foreign Relations met in executive session on June 13, 1972, and, by a voice vote, ordered S. 3722 reported favorably to the Senate.

The Senate debated and considered S. 3722 on June 22, 1972. It was passed by a record vote of 56-27 after a short debate.

After substantial delay, hearings are now being held in the House of Representatives. However—even before completion of House hearings—it became apparent that efforts were underway to prevent the full House from having an opportunity to debate and vote on this important matter. This subject has been before us for several years now. It has been studied by Committees in both Houses of Congress for more than enough time. Enough hearings have been held. Enough studies have been made. Until the Congress acts, these dedicated foreign service officers will continue to be routinely and systematically deprived of one of their most basic rights—their right to procedural due process in the resolution of their employment grievances. The State Department has failed to act to provide the rights for 26 years—

ACT FOR THE PROTECTION OF FOREIGN OFFICIALS  
AND OFFICIAL GUESTS OF THE UNITED STATES

U.S. CODE CONG. AND ADM. NEWS P. 4316 TO 4322 (1972)

now it is time for Congressional action. For these reasons, the Committee adopted this amendment in order to allow the full House the opportunity to pass on this vital issue.

4322



NEW YORK AUTO LAW SECTION 15

Members or representatives of United Nations delegations.  
Individuals accredited to the United Nations who appear on  
the diplomatic immunity and privilege list of the United  
Nations as maintained by the Department of State of the  
United States are not subject to the provisions of the laws  
of this State as to registration of motor vehicles owned by  
them. In this category also are representatives to the  
United Nations having status equivalent to that of ambassadors.





REQUEST TO CHARGE #5

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

74 Cr. 705

UNITED STATES OF AMERICA

vs.

STANLEY SPIRN

REQUESTS TO CHARGE

1 --

2 --

3 --

4 --

5. Knowledge that a crime is being committed, even when coupled with presence at the scene, without more, is insufficient to prove the offense charged against this defendant. U.S. vs. Garguilo, 310 F.2d 249, 254 (1962, 2nd Cir. S. Dist. of N.Y.)

APPLICATION FOR APPOINTMENT AS INDIGENT

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

: No. 74 Cr. 704

Plaintiff

MOTION FOR APPOINTMENT OF  
COUNSEL FOR INDIGENT DEFENDANT

vs.

STANLEY SPIRN, et al

Defendants

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TO: PRESIDING MAGISTRATE

SIR:

The undersigned hereby moves to be appointed as  
attorney for the defendant, an indigent, in his defense in  
the above matter.

Attached are certifications in support of the aforesaid  
motion.

Dated: Sept. 16, 1974

Robert S. Persky  
ROBERT S. PERSKY  
Attorney for Deft. Spirn



APPLICATION FOR APPOINTMENT AS INDIGENT

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

Plaintiff

vs.

STANLEY SPIRN, et al

Defendant

No. 74 Cr. 704

CERTIFICATION

The undersigned hereby certifies to the following:

(1) I am a member of the bar of the State of New Jersey and admitted to practice before the United States District Court, District of New Jersey.

(2) The defendant, Spirn, in the above matter has been adjudicated an indigent in the matter of United States of America vs. Spirn, et al by Order of Judge Stewart entered on August 8, 1974.

(3) The said defendant has requested that the undersigned make application to this Court to be appointed as assigned counsel in his behalf under the Criminal Justice Act.

(4) The undersigned previously appeared in this matter on the arraignment of the defendant and the argument of motions subsequent thereto.

(5) The undersigned in support of this Motion relies upon the case of United States of America vs. Oddo, 474F.2nd 978 (1973) wherein it was adjudicated that counsel may be appointed by the Court pro hac vice and compensated for his services under the terms of said Criminal Justice Act.

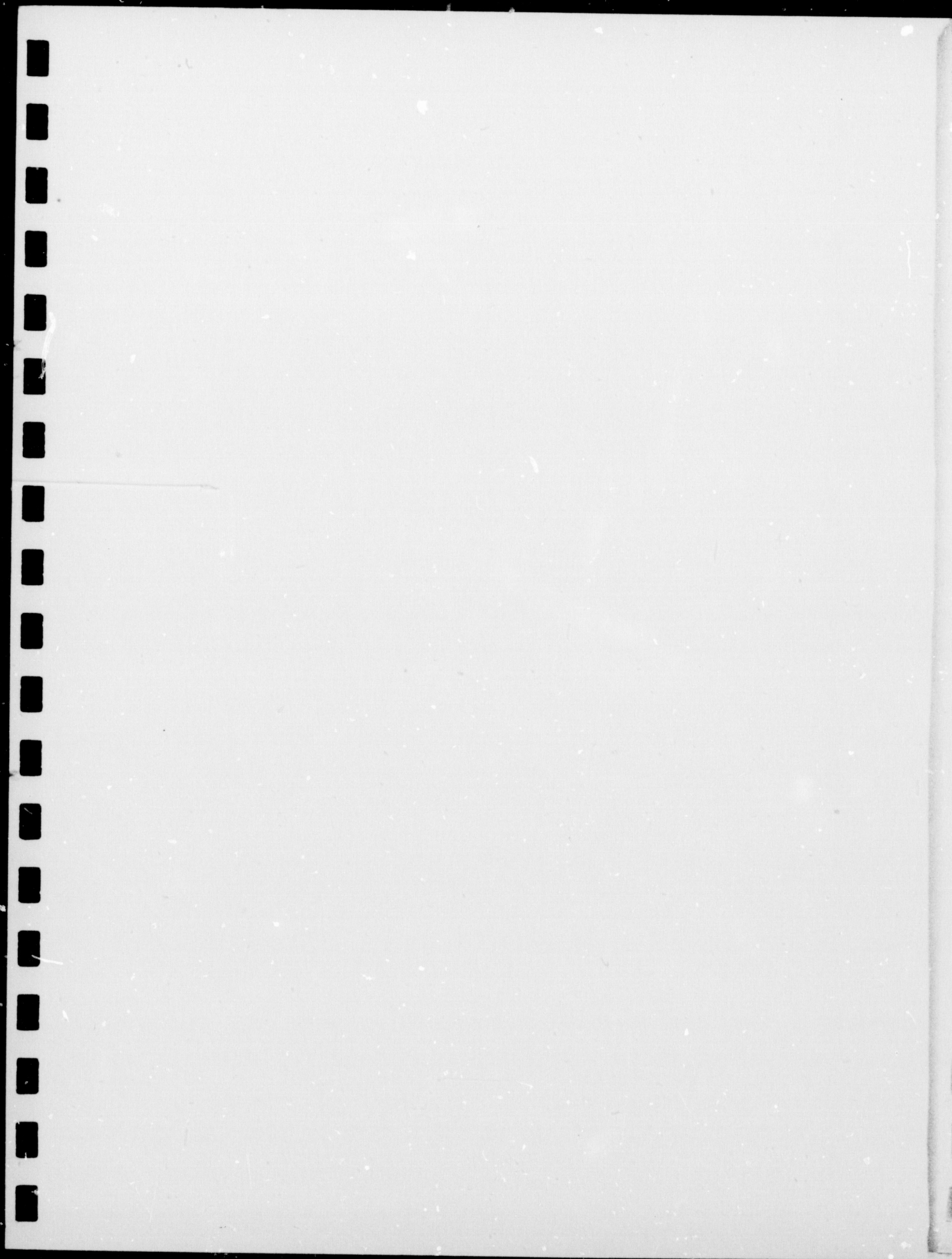
APPLICATION FOR APPOINTMENT AS INDIGENT

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are wilfully false, I am subject to punishment.

Dated: September 16, 1974

Robert S. Persky  
ROBERT S. PERSKY  
Attorney For Deft. Spirn





APPLICATION FOR APPOINTMENT AS INDIGENT

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

No. 74 Cr. 704

UNITED STATES OF AMERICA :

Plaintiff

CERTIFICATION

vs.

STANLEY SPIRN, et al :

Defendants :

The undersigned hereby certifies to the following:

1. I am the defendant in the above matter.

2. On August 8, 1974 I was adjudicated an indigent by Judge Stewart (superseding 73 Cr. 990).

3. My financial status has not changed since the entry of this Order and I am still indigent and have no means of paying counsel to defend me in this matter.

4. I respectfully request that Robert S. Persky, Esq., be appointed to defend me in my behalf and be compensated for services under the terms of the Criminal Justice Act.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are wilfully false, I am subject to punishment.

Dated, September 16, 1974

/s/ Stanley Spirn  
STANLEY SPIRN